TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

N[redacted] 68

JAMES FRANCIS HILL, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 30, 1960
CERTIORARI GRANTED MARCH 20, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 833

JAMES FRANCIS HILL, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Docket 10,113

THE UNITED STATES

-v-

JAMES FRANCIS HILL, alias James Hill, alias Jos. Carter, alias Albert Meisler, alias George Collins, alias Joe

Sec. 2312, Ti. 18, USC, NMVTA 1 count

Attorney for U. S.: Otto T. Ault

For Defendant: W. N. Dietzen, Appointed

April 1954
Jack Bryan and E. B. Baker appointed

DOCKET ENTRIES

Nov. 10, 1952	Indictment filed.
Nov. 17, 1952	James Francis Hill committed to custody of Attorney General until mentally competent to stand trial, or until pending charges against him are otherwise disposed of. Darr, D. J. Min. Bk. "Z" p. 32
Dec. 11, 1952	Order for James Francis Hill returned executed and filed. Deft. delivered to Springfield, Mo. on 11-24-52 by Petre, Deputy U. S. Marshal.
Jan. 28, 1953	Hill's motion for correction of sentence and or appeal to Circuit Court of Appeals filed. Service by Hill to U. S. Attorney.
Feb. 3, 1953	Opinion, Darr. D. J. on next above motion filed. Service by Clerk to all parties.
Feb. 4, 1953	Opinion Darr, D. J. on next above motion and copies of the indictment and order of commitment mailed to Hill by Clerk.

Feb. 5, 1953 File of James Francis Hill mailed to Court of Appeals, Cincinnati, Ohio. Notice given to U. S. Attorney.

Feb. 18, 1953 Transcript of official court reporter filed.

May 23, 1953 Order, Darr, D. J. that Court Reporter's transcript be sent to Clerk of the Court of Appeals, Cincinnati.

May 26, 1953 Court Reporter's transcript mailed to Clerk of the Court of Appeals.

Oct. 21, 1953 Motion of Defendant Hill for further disposition of the case, filed.

Oct. 23, 1953 Mandate of U. S. Court of Appeals and copy of opinion filed.

May 6, 1954 Plea of defendant (plea of insanity at time of offense) filed.

May 6, 1954 Plea of not guilty by Deft. Hill on grounds of insanity at time of crime; represented by attorneys; bond fixed at $15,000.00 and remanded to the custody of the Marshal. Min. Bk. "Z" p. 828

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June 2, 1954 Motion of U. S. Attorney for judicial determination of mental competency of defendant, filed. Order, Darr, D. J. overruling said motion filed. Min. Bk. "Z" p. 875

June 2, 1954 Trial to jury begun. Jury respited until 9:30 A.M. June 3, 1954. Min. Bk. "Z" p. 878

June 3, 1954 Trial to jury resumed. Plaintiff's proof heard; motion of defendant for judgment of acquittal as to kidnapping charge; motion overruled; motion of defendant for judgment of acquittal as to being competent; motion overruled; part of defendant's proof heard; jury respited to 9:30 A.M., June 4, 1954. Min. Bk. "Z" p. 878

June 4, 1954	Trial to jury resumed; proof completed; argument of counsel; charge of Court; verdict of guilty; Min. Bk. "Z" p. 882
June 4, 1954	*Judgment*: Three years on the one count; sentence to begin at the expiration of sentence imposed in No. 10,114, Darr, D. J., filed. Min. Bk "Z" p. 882
June 9, 1954	Defendant's motion for new trial filed. Service made by counsel.
June 11, 1954	Petition of U. S. Attorney for Writ of Habeas Corpus Ad Prosequendum for Deft. Hill, filed.
June 11, 1954	Order, Darr, D. J. granting above petition filed. Min. Bk. "Z" p. 894
June 11, 1954	Writ of Habeas Corpus Ad Prosequendum issued and delivered to the U. S. Marshal for service.
June 15, 1954	Motion for new trial heard; argued by defendant's counsel and overruled by Darr, D. J.
June 18, 1954	Copy of Commitment, Deft. Hill, returned executed and filed. Defendant delivered 6-7-1954 to Fed. Pen., Atlanta, Georgia. Lindsay, USM.
June 25, 1954	Writ of Habeas Corpus Ad Prosequendum returned executed and filed. Quarles, USM
Oct. 18, 1954	Motion of James Francis Hill, to vacate sentence, filed.
Oct. 27, 1954	Opinion, Darr, D. J., denying petition, filed. Service of copies by Clerk by mail.
Nov. 18, 1954	Notice of Appeal of James Francis Hill, filed.
Nov. 17, 1954	Court Reporter's transcript filed.
Nov. 18, 1954	Order, Darr, D. J., that notice of appeal be filed (submitted by plaintiff on Nov. 8, 1954) and defendant be furnished a part of the technical record, filed. Min. Bk. A-1, p. 36

Dec. 22, 1954	Supplemental opinion, Darr, D. J., on defendant's petition to vacate sentence, filed. Petition denied. Copies mailed by Clerk.
[fol. 3]	
Dec. 22, 1954	Order, Darr, D. J., on next above opinion, directing technical record to be sent to the Court of Appeals; record of inqusition hearing be furnished by official court reporter on pauper oath, etc; time for filing record on appeal extended additional 30 days, filed. Min. Bk. "A-1" p. 100
Jan. 10, 1955	Court Reporter's transcript filed. Copy mailed to Defendant.
Jan. 18, 1955	Record on Appeal mailed to U. S. Court of Appeals, defendant notified.
Aug. 4, 1955	Opinion, Martin, Miller and Stewart, C.Js. and mandate filed. Entire file received from Court of Appeals
Aug. 8, 1955	Order on Mandate affirming judgment of District Court, Darr, D.J. filed. Min. Bk. "A-1" p. 416
Mar. 15, 1956	Deft. James Francis Hill's motion to vacate sentence and advance notice of appeal filed. Service to U. S. Attorney by Hill.
Mar. 21, 1956	Memorandum, Darr, D.J. denying motion to vacate sentence and permitting the filing of the motion upon the pauper's oath, filed. Copies served by Clerk.
Mar. 21, 1956	Order, Darr, D.J., denying defendant's motion to vacate sentence under Section 2255, Ti. 28, USCA; the Court permitting the filing of motion upon the pauper's oath taken, filed. Min. Bk. "A-1" p. 692. Service made by Clerk.
Mar. 29, 1956	Record on Appeal mailed to Court of Appeals, Cincinnati, Ohio.
April 2, 1956	Notice of Appeal in forma pauperis.
April 8, 1957	Mandate from Court of Appeals, affirming judgment of District Court, filed.

Dec. 19, 1957	Deft. James Francis Hill motion to vacate sentence filed. Service by deft. to U. S. Attorney.
Jan. 10, 1958	Memo Opinion, Darr, D. J. denying motion to vacate sentence, filed. Service of copy made by clerk.
Jan. 16, 1958	Notice of Appeal, by James Francis Hill, in forma pauperis, filed.
Jan. 16, 1958	Record mailed to Court of Appeals.
Jan. 21, 1958	Entire Old Record mailed to Court of Appeals.
Feb. 14, 1958	Letter received from Deft. Hill and filed. (Letter requested trial transcript.)
Feb. 14, 1958	Order, Darr, D. J., giving three reasons why request for transcript of trial cannot be granted, filed. Certified copy to Hill and original mailed to Court of Appeals.
[fol. 4]	
July 21, 1958	Opinion, Simons, Miller & Stewart, Circuit Judges, setting aside order of District Court and remanding case for further proceedings, filed.
July 21, 1958	Mandate remanding case to District Court, filed.
July 21, 1958	Motion of James Francis Hill to vacate sentence filed. Affidavit in support thereof filed.
Aug. 6, 1958	Petition for writ of Habeas Corpus Ad Prosequendum filed.
Aug. 6, 1958	Order, Taylor, D. J. that writ be issued, filed. Min. Bk. A-3 p. 648
Aug. 6, 1958	Writ of Habeas Corpus Ad prosequendum issued and mailed to U. S. Marshal for service.
Aug. 27, 1958	Response of U.S.A. to petitioner's motion to vacate sentences. Service made by counsel.

Sept. 2, 1958	Order, Taylor, D. J. on mandate filed. Min. Bk. "B" p. 2
Sept. 10, 1958	This cause came on to be heard on defendant's motion to vacate sentence, before Taylor, D. J. Defendant appeared in person and by Attorney, Joseph B. Roberts, appointed by the Court. All of defendant's evidence was heard; part of the plaintiff's proof was heard; Court adjourned until 9:00 A.M. Sept. 11, 1958. Min. Bk. "B" p. 8.
Sept. 11, 1958	Hearing on defendant's motion to vacate sentence resumed, Taylor, D. J. U. S. proof completed; rebuttal by defendant; argument of counsel; motion denied. Min. Bk. "B" p. 9.
Sept. 11, 1958	Order, Taylor, D. J. that motion to vacate be and hereby is denied; that petitioner be returned to custodial agent of the government; or custody of Attorney General, filed. Min. Bk. "B" p. 10-a-b-c-d-e-f-g
Sept. 11, 1958	Order, Taylor, D. J., granting leave to appeal in forma pauperis, etc. filed. Min. Bk. "B" p. 11.
Sept. 11, 1958	Notice of Appeal filed.
Sept. 11, 1958	Order, Taylor, D. J., instructing Marshal to deliver James Francis Hill to Warden, U. S. Penitentiary, Atlanta, Georgia, instead of U. S. Medical Center, Springfield, Mo. Min. Bk. "B" p. 12.
Sept. 12, 1958	Copy of notice of appeal and docket entries mailed to Court of Appeals.
Oct. 9, 1958	Entire record mailed to Court of Appeals, Cincinnati, Ohio.
Oct. 17, 1958	Order, Taylor, D. J. extending time to file transcript of testimony, to Dec. 12, 1958, filed. Min. Bk. "B" p. 63

Oct. 21, 1958	Writ of Habeas Corpus Ad Prosequencum returned executed and filed. Farmer, D. Marshal.
Dec. 15, 1958	Order, Miller, J., for Sixth Circuit, U. S. Court of Appeals, extending time to Jan. 11, 1959 to file transcript of testimony, filed.

[fol. 5]

Oct. 21, 1959	Motion of Defendant Hill to vacate sentence, filed.
Oct. 28, 1959	Opinion, McAllister & Miller, C. Js, and Cecil, D.J. filed.
Oct. 28, 1959	Mandate affirming judgment of District Court filed.
Nov. 16, 1959	Amendment to motion to vacate sentence filed.
Nov. 20, 1959	Letter of James Francis Hill, dated Nov. 15, 1959, filed as part of motion to vacate sentence and plea.
Nov. 27, 1959	Letter from Deft. dated Nov. 21, 1959, regarding response to motion to vacated sentence, filed. Letter acknowledged by J. R. Dale, Deputy Clerk.
Dec. 10, 1959	Letter from Deft. dated Dec. 7, 1959, to James W. Parrott, filed.
Dec. 29, 1959	Letter from Deft. dated Dec. 26, 1959, regarding notes of deceased court reporter, etc. filed.
Jan. 7, 1960	Letter from Deft. dated Jan. 4, 1959, seeking to have Government ruled in default for not responding to defendant's motions, filed.
Jan. 7, 1960	Response of U.S.A. to petitioner's motion to vacate sentences, filed. Certified copy mailed to deft. by Clerk.

Jan. 14, 1960 Traverse of Deft. Hill to response of U.S.A. filed. Service of copy made by defendant.

Jan. 14, 1960 Memorandum Opinion, Taylor, D. J. denying petitioner's motion filed Oct. 21, 1959 and amending motion filed Nov. 16, 1959 to vacate the sentences filed. Copy mailed defendant by Clerk.

Jan. 14, 1960 Order, Taylor, D. J. denying petitioner's motion filed, Oct. 21, 1959 and amended motion filed Nov. 16, 1959. Min. Bk. "B" p. 675

Jan. 22, 1960 Letter from Deft. Hill stating he had not received copy of Opinion, Taylor, D. J. ruling on his motion to vacate sentences, and advising he wished to file notice of appeal in forma pauperis if ruling was against him, etc. filed.

Jan. 25, 1960 Notice of Appeal filed.

Jan. 25, 1960 Order, Taylor, D. J., that motion to appeal in forma pauperis be and hereby is granted, filed. C. O. Bk. 10, p. 681

Jan. 27, 1960 Copy of Notice of Appeal and Docket Entries mailed to Court of Appeals, Cincinnati, Ohio.

[fol. 6]

Feb. 8, 1960 Delayed Notice of Appeal, Affidavit of Poverty, and petition for trial copy of transcript filed.

Feb. 9, 1960 Order, Taylor, D. J. covering Mandate of Court of Appeals, filed Oct. 28, 1959, affirming judgment of lower court, filed. Min. Bk. "B" p. 696

Feb. 11, 1960 Order, Taylor, D. J. denying defendant's prayer to file, docket and prosecute appeal, filed. Min. Bk. "B" p. 697 Certified copy mailed to defendant by Clerk.

[fol. 7]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

No. 10,114

THE UNITED STATES

-v-

JAMES FRANCIS HILL, alias James Hill, alias Jos. Carter, alias Albert Meisler, alias George Collins, alias Joe
Section 1201 Ti. 18, USC 1 count—kidnapping

Attorney for plaintiff: Otto T. Ault

For Defendant: Wood, Dietzen & Parks, appointed.

April, 1954
E. B. Baker & Jack Bryan appointed for Hill

DOCKET ENTRIES

Nov. 10, 1952	Indictment filed.
Nov. 12, 1952	Court appointed Wood, Dietzen & Parks as counsel for James Francis Hill.
Nov. 13, 1952	Motion of Deft. Hill for mental examination, filed. Service of copy made by counsel.
Nov. 13, 19[illegible]	Order, Darr, D. J. that Deft. Hill be examined by one qualified psychiatrist, and Dr. J. B. Swafford is appointed to make such examination, filed. Min. Bk. "Z" p. 29.
Nov. 17, 1952	Def. Hill found to be mentally incapable of standing trial; committed to custody of Atty Gen'l until such time as able to stand trial, Darr, D. J. Min. Bk. "Z" p. 32
Jan. 28, 1953	Hill's motion for correction of sentence and/or appeal to Circuit Court of Appeals filed. Service by Hill to U. S. Attorney

Feb. 3, 1953	Opinion on next above motion filed. Service by Clerk.
Feb. 5, 1953	File of James Francis Hill mailed to Court of Appeals, Cincinnati. Notice given to U. S. Atty.
Feb. 18, 1953	Transcript of Official Court Reporter filed.
May 23, 1953	Order, Darr, D. J. that Court Reporter's transcript be sent to Clerk, Court of Appeals, filed.
May 26, 1953	Court Reporter's transcript and original order, Darr, D. J. mailed to Court of Appeals.
Oct. 21, 1953	Motion of Deft. Hill for further disposition of the case, filed.
Oct. 23, 1953	See Cr. No. 10,113 for mandate and copy of Opinion of U. S. Court of Appeals.
May 6, 1954	Written plea of not guilty; insanity at time offense was committed, filed. Service of copy by counsel.
May 6, 1954	Deft. Hill, plea of not guilty on grounds of insanity at time crime was committed; bond fixed at $15,000; remanded to custody of Marshal; Represented by Attorney; Min. Bk. "Z" p. 828

[fol. 8]

June 2, 1954	Order, Darr, D. J., overruling motion regarding mental competency, filed. Ent'd Min. Bk. "Z" p. 875
June 2, 1954	Trial to jury begun; jury respited to 9:30 A.M. Min. Bk. "Z" p. 878
June 3, 1954	Trial to jury resumed; plaintiff's proof heard; motion of deft. for judgment of acquittal as to kindapping charge; motion overruled; motion of defendant for judgment of acquittal as to competency; motion overruled; part of defendant's proof heard; jury respited to 9:30 A.M. June 4, 1954. Min. Bk. "Z" p. 878

June 4, 1954	Trial to jury resumed; proof completed; argument of counsel; charge of Court; verdict of guilty; Min. Bk. "Z" p. 882
June 4, 1954	*Judgment*: 20 years on the one count of the indictment, Darr, D. J. filed. Min. Bk. "Z" p. 883
June 9, 1954	Defendant's motion for new trial filed. Service made by counsel.
June 15, 1954	Motion for new trial heard; argued by defendant's counsel and overruled by Darr, D. J.
June 18, 1954	Copy of commitment returned executed and filed. Defendant delivered 6-7-1954 to Fed. Pen., Atlanta, Georgia. Lindsay, D.M.
Oct. 18, 1954	Motion of James Francis Hill to vacate sentence filed.
Nov. 17, 1954	Court Reporter's transcript filed.
Nov. 18, 1954	Notice of Appeal of James Francis Hill filed.
Nov. 18, 1954	Order, Darr, D. J. that notice of appeal submitted by plaintiff on Nov. 8, 1954 be filed and defendant be furnished a part of technical records, filed. Min. Bk. "A-1" p. 36
Dec. 22, 1954	Supplemental Opinion, Darr, D. J. filed. (Motion or petition to vacate sentence overruled; service made by Clerk.
Dec. 22, 1954	Order, Darr, D. J. directing that all of technical record be sent up to Court of Appeals; transcription of inquisition hearing be made and filed and on pauper oath, etc; extending time for filing record on appeal for 30 additional days, filed. Min. Bk. "A-1" p. 100.
Jan. 10, 1955	Court Reporter's transcript filed.

Jan. 18, 1955 Record mailed to U. S. Court of Appeals.

Aug. 4, 1955 Opinion and Mandate, together with entire file, received from Court of Appeals and filed.

Aug. 8, 1955 Order on Mandate, affirming judgment of District Court, Darr, D. J. filed. Min. Bk. "A-1" p. 416

Mar. 15, 1956 Deft. James Francis Hill's motion to vacate sentence and advance notice of appeal filed. Service to U. S. Attorney by Hill.

[fol. 9]

Mar. 21, 1956 Memorandum, Darr, D. J., denying motion to vacate sentence and permitting the filing of the motion upon the pauper oath taken, filed. Copies served by Clerk.

Mar. 21, 1956 Order denying defendant's motion to vacate sentence under section 2255, Title 28, USCA, the Court permitting the filing of motion upon the pauper's oath taken. Min. Bk. "A-1" p. 692

Mar. 29, 1956 Record on Appeal mailed to Court of Appeals.

Apr. 2, 1956 Notice of Appeal in forma pauperis filed

Apr. 8, 1957 Mandate from Court of Appeals, confirming order of District Court, filed.

Dec. 19, 1957 Deft. James Francis Hill's motion to vacate sentence filed. Service by Deft. to U. S. Attorney.

Jan. 10, 1958 Memorandum, Darr, D. J., denying motion to vacate sentence, filed. Service of copy to Hill and U. S. Attorney by Clerk.

Jan. 16, 1958 Notice of Appeal by James Francis Hill in forma pauperis filed.

Jan. 16, 1958 Record mailed to Court of Appeals.

Jan. 21, 1958	Entire Old Record mailed to Court of Appeals.
Feb. 14, 1958	Letter received from Hill. (Letter requested trial transcript.)
Feb. 14, 1958	Order, Darr, D. J. giving three reasons why request for transcript of trial cannot be granted, filed. Certified copy to Hill and original to Court of Appeals.
July 21, 1958	Opinion, Simons, Miller & Stewart, Circuit Judges, setting aside the order of the District Court, and remanding case to District Court, filed.
July 21, 1958	Mandate remanding case to District Court filed.
July 21, 1958	Motion of James Francis Hill to vacate sentence and affidavit in support thereof, filed.
Aug. 6, 1958	Petition for Writ of Habeas Corpus Ad prosequendum filed.
Aug. 6, 1958	Order, Taylor, D. J. that writ be issued, filed. Min. Bk. "A-3" p. 648
Aug. 6, 1958	Writ of Habeas Corpus Ad Prosequendum issued and mailed to U. S. Marshal for service.
Aug. 27, 1958	Response of U. S. A. to petitioner's motion to vacate sentences filed herein on Dec. —— 1957, filed. Service of copies by counsel.
Sept. 2, 1958	Order, Taylor, D. J. on mandate filed.
Sept. 10, 1958	Cause came on to be heard on defendant's motion to vacate sentence, before Taylor, D. J. Defendant appeared in person and by Attorney Jos. B. Roberts appointed by the Court. All of defendant's evidence was heard; part of plaintiff's proof heard; Court adjourned until 9 A.M., Sept. 11, 1958. Min. Bk. "B" p. 8

[fol. 10]

Sept. 11, 1958	Hearing on defendant's motion to vacate sentence resumed, Taylor, D. J. U. S. proof completed; rebuttal by defendant; argument of counsel; motion denied; Min. Bk. "B" p. 9.
Sept. 11, 1958	Order, Taylor, D. J. that motion to vacate be and hereby is denied; that petitioner be returned to custodial agent of the government, or custody of the Attorney General, filed. Min. Bk. "B" p. 10-a-b-c-d-e-f-g
Sept. 11, 1958	Order, Taylor, D. J., granting leave to appeal in forma pauperis, filed. Min. Bk. "B" p. 11
Sept. 11, 1958	Notice of Appeal filed. Service of copy by counsel.
Sept. 11, 1958	Order, Taylor, D. J., instructing Marshal to deliver James Francis Hill to Warden, U. S. Penitentiary, Atlanta, Georgia, instead of U. S. Medical Center, Springfield, Mo. filed. Min. Bk. "B" p. 12.
Sept. 12, 1958	Copy of notice of appeal and docket entries mailed to Court of Appeals.
Oct. 9, 1958	Entire record mailed to Court of Appeals, Cincinnati, O.
Oct. 17, 1958	Order, Taylor, D. J. extending time for filing transcript of testimony to Dec. 12, 1958, filed. Min. Bk. "B" P. 63
Oct. 21, 1958	Writ of Habeas Corpus Ad Prosequendum returned executed and filed. Farmer, D.M.
Dec. 15, 1958	Order, Miller, D. J., for 6th Circuit, U. S. Court of Appeals, to extend to Jan. 11, 1959, time for filing transcript of testimony, filed.
Oct. 21, 1959	Motion of Deft. Hill to vacate sentence filed.

Oct. 28, 1959 Opinion, McAllister & Miller, C. Js, and Cecil, D. J. filed.

Oct. 28, 1959 Mandate affirming judgment of District Court filed.

Nov. 16, 1959 Amendment to motion to vacate sentence filed.

Nov. 20, 1959 Letter of James Francis Hill, dated Nov. 15, 1959, filed as a part of the motion to vacate sentence and plea.

Nov. 27, 1959 Letter from Deft. dated Nov. 21, 1959, regarding response to motion to vacate sentence, filed. Letter acknowledged by Dale, D. C.

Dec. 29, 1959 Letter from Deft. dated Dec. 26, 1959, regarding notes of deceased Court Reporter, etc. filed.

Jan. 7, 1960 Response of U.S.A. to petitioner's motion to vacate sentences, filed. Certified copy mailed defendant by Clerk.

Jan. 14, 1960 Traverse of Deft. Hill, to response of U.S.A. filed. Service of copy made by defendant.

Jan. 14, 1960 Memorandum Opinion, Taylor, D. J. denying petitioner's motion filed Oct. 21, 1959, and amended motion filed Nov. 16, 1959, to vacated the sentences filed. Copy mailed defendant by Clerk.

[fol. 11]

Jan. 14, 1960 Order, Taylor, D. J. denying petitioner's motion, filed Oct. 21, 1959, and amended motion filed Nov. 16, 1959, to vacate the sentences filed. Copy mailed defendant by Clerk. Min. Bk. "B" p. 675

Jan. 22, 1960	Letter from Defendant Hill, stating he had not received a copy of Opinion, Taylor, D. J., ruling on his motion to vacate sentences, and advising he wished to file notice of appeal in forma pauperis, if ruling was against him, etc. filed.
Jan. 25, 1960	Notice of Appeal filed.
Jan. 25, 1960	Order, Taylor, D. J., that motion to appeal in forma pauperis be and hereby is granted, filed. C. O. Bk. 10, p. 681
Jan. 27, 1960	Copy of Notice of Appeal and Docket Entries mailed to U. S. Court of Appeals, Cincinnati, Ohio.

[fol. 12]

Feb. 8, 1960	Delayed Notice of Appeal, Affidavit of Poverty and petition for trial copy of transcript filed. Affidavit of service filed.
Feb. 9, 1960	Order, Taylor, D. J. covering Mandate of Court of Appeals, filed Oct. 28, 1959, affirming the judgment of the lower court, filed. Min. Bk. "B" p. 696
Feb. 11, 1960	Order, Taylor, D. J., denying defendant's prayer to file, docket and prosecute appeal, filed. Min. Bk. "B" p. 697 Certified copy mailed to defendant by Clerk.

[fol. 13] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

No. 10,113 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FRANCIS HILL, DEFENDANT

TRANSCRIPT OF PROCEEDINGS OF JUNE 2-4, 1954

• • • •

[fol. 14] June 2, 1954.

BEFORE:

The Honorable Leslie R. Darr, Judge.

(Came the parties as before for trial on defendant's plea of not guilty because of insanity.)

(On motion by the United States Attorney, the Court, in the absence of the jurors, inquired into the present mental condition of the defendant. Following the introduction of proof on behalf of the government and the defendant, the Court held the defendant was mentally capable of standing trial and advising with counsel.)

MOTION TO STRIKE SECOND PORTION OF DEFENDANT'S PLEA AND GRANTING THEREOF

GEN'L MEEK: May it please the Court, before the jurors come back in I would like to move that the second portion of the defendant's pleas be stricken.

THE COURT: I believe the gentlemen will agree with that. This plea mentions insanity. You did not mention any time on that. Who wrote it of counsel?

MR. BAKER: I drew it up.

GEN'L MEEK: Of course the defendant pleads not guilty by reason of insanity. Of course that is at the time shown in the affidavit. The second party states:

"In support of said plea defendant will show that he has been adjudged insane and spent many years at mental [fol. 15] institutions, and will show also that he was adjudged insane shortly after the occurrence of the alleged offence with which he is charged. Defendant has not been declared sane, but on the contrary the United States Circuit Court of Appeals has also ruled defendant insane." So that indicates a plea of present insanity.

THE COURT: That would indicate it. The idea, as I understand the law, either sanity or insanity could be subject to adjudication. I assume you do not have any objection to strike the last part, do you? If you do I am striking it anyhow, because it relates to a plea of present insanity. As the defendant is ajudged insane at one time he remains insane until he is proven sane, sofar as the law is concerned. To strike the second part of the plea, I think, is proper. The other part stays in, you gentlemen for the defendant.

(The jurors were recalled to the court room.

(The jury was impaneled, examined and accepted, having heretofore been sworn to try all cases.)

Following the introduction of all the evidence offered on the trial of the case, oral arguments by counsel for the respectie parties and charge of the Court, the jury retired for consideration of their verdicts, later reporting into open court that they found the defendant guilty as charged in each case.)

[fol. 16] *(The case was called for judgment)

THE COURT: Does the government care to say anything?

GEN'L DAVIS: The Government does not care to make any statement, your Honor. I think it has been developed in the proof, the character of this defendant and the other crimes which he has committed.

THE COURT: I believe the other co-defendant, the adult got seventeen years?

GEN'L DAVIS: He received fifteen years on the kidnapping and two years on the Dyer Act. The minor boy received five years in the kidnapping charge and one year and one day on the Dyer Act charge.

THE COURT: That is the way I remembered it.

Now, gentlemen, Mr. HIll has been a puzzle to the Court for a long time. Intermittently the Court has gone into it considerably. I have studied about his case, his condition, and I feel like I am familiar with it. The court ajudicated on appeal that Mr. Hill was incompetent, that he was unable to properly advise counsel and defend himself in the trial. Since that time there has been considerable psycopathic examinations and I think if another case of similar charaxter comes up I will use the privilege which permits the Court to refer a man for observation rather than to take one examination, and make a general [fol. 17] practice of getting one or more psychiatric examinations. Taking the psychiatric examinations all the way through, together with the lay testimony, and from what I have seen through several years, I am of opinion that Mr. Hill is emotionally upset, that he is what is termed, seems to be a psychopathic personality. In other words, he is mentally and emotionally disturbed, and I think one doctor described it as I really believe he is, that he does these things and he knows what he is doing, and yet does them.

The question of the human mind and its envolvements is very difficult and Mr. Hill for his own protection and for the protection of society, it looks like he has to be kept up. He is so anti-social, and with his moralities, he gets out there and does these things. But I believe he knows what he is doing and knows the result of it from all the proof.

And, I think the jury's verdict was proper in every respect from the standpoint of the law and the facts.

Then the question of punishment. The kidnapping of course is serious. While it is true the kidnapping is not the most flagrant it could be by any means, but it is bad enough. It is always a bad thing to force somebody against their will at gun point to do sometjhing he does [fol. 18] not want to do.

So, he is going to do what he wants to do. He is anti-social and he is going to do what he wants to do. He has indicated that on many occasions when he knows it is not right to do what he does. And I think the punishment should be substantial. I think I also should consider that

Mr. Hill has been incarcerated nineteen months by reason of these transactions back and forth, in jail and in institutions at Springfield and in Massachusetts, but instead of nineteen months I am going to make it two years from what I have in mind making the sentence. Instead I am taking off two years from what I had in mind. I had in mind it should be twenty-five years.

SENTENCE

In the kidnapping case, twenty years sentence.

In the Dyer Act case, three years.

The kidnapping case to run first and the Dyer Act case to run consecutive with the kidnapping case.

That terminates it so far as the prssent is concerned. Remand Mr. Hill to the marshal.

I do hereby certify that the foregoing is a true, correct and complete transcript of my shorthand notes taken of all proceedings had on arraignment, plea and judgment in the above entitled cause.

/s/ Charles M. Fain
CHARLES M. FAIN,
Official Court Reporter.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Criminal Actions Nos. 10113 and 10114

UNITED STATES OF AMERICA

vs.

JAMES FRANCIS HILL

EXCERPTS FROM MEMORANDUM OPINION—Sept. 11, 1958

THE COURT: These cases, Criminal Nos. 10113 and 10114, are before the court on the petition of James Francis Hill to vacate sentences imposed pursuant to the verdict of the jury. The petition and motion are filed under title 28, section 2255 U.S.C. The motion was denied by this court on January 10, 1958, and following the order of denial an appeal was perfected to the Court of Appeals in Cincinnati.

The Court of Appeals, in a per curiam opinion filed June 26, 1958, reversed the action of this court because this court failed to grant a hearing on ground No. 5 of the petition, which charges, in substance, that the petitioner was denied his constitutional right, under the due process clause of the fifth amendment, in that he was deprived by "custodial agents of the United States Attorney General in their refusal to allow petitioner to [fol. 20] prepare and file notice of appeal within the time set forth by law, Rule 37(a)2, Federal Rules of Criminal Procedure, title 18, U.S.C." Petitioner had filed at least two petitions to vacate the sentences prior to the time the one under consideration was filed, each of which was denied by this court, from which appeals were taken, and the action of this court was affirmed by the Court of Appeals. Hill v. United States, 223 Fed 2nd 699, 6th Circuit, certiorari denied 350 U.S. 867. Hill v. United States, 238 Fed. 2nd 84, 6th Circuit (1956).

The court heard proof on the factual question as to whether Hill was denied the right of appeal by the custodial agents of the government yesterday and today. (Clerk's Note: A recitation of Facts Follow.) • • • • [fol. 21] In summary, the employees of the Hamilton County Jail and the employees of the United States government in Atlanta testified positively and unequivocally that Hill was not denied the right to give notice of an appeal from the sentences pronounced in this court during the ten-day period that followed the date that his motion for new trial was overruled, namely, June 15, 1954. Many of these witnesses served meals to Hill while he was incarcerated in the institution here in Chattanooga and the institution in Atlanta. At least one of the witnesses who worked at the Hamilton County jail while Hill was incarcerated there talked with him on an average of three times per day, and at least one of the witnesses who worked in the Atlanta prison while Hill was there likewise was talking with him on an average of three times each day.

It is the opinion of the court and the court finds as a fact that the employees of the Hamilton County jail and the agents, representatives and custodians of the Atlanta prison did not refuse the right to Hill to give notice of his appeal from the judgment overruling the motion for a new trial, during the ten-day period that followed the action of the trial court in overruling the motion for a [fol. 22] new trial or at any other time.

Hill stated that in addition to his denial of the rights of appeal, he was deprived of his constitutional rights because (1) he trial court did not properly instruct the jury on his defense of insanity; (2) that the trial court did not ask him if he had anything to say in his behalf immediately before sentence was pronounced on June 4, 1954, and that this was a riolation of Rule 32(a) of the Federal Rules of Criminal Procedure; (3) that the trial court erred in permitting statements of Doctor Graff and Doctor Miles relating to Hill's mental examination, under title 18 U. S. C. section 4244, to be brought before the jury; and (4) that the sentences were illegal because they were imposed in violation of the constitution of the United States in that a confession was used before the jury

which was illegally obtained from Hill by the officers, and he, Hill, was not taken before the nearest available magistrate or United States commissioner for arraignment within a reasonable time after he was arrested.

It is this court's interpretation of the Court of Appeals' opinion that the case was remanded to this court for the sole purpose of hearing evidence on the question of whether or not Hill was denied his right to give notice [fol. 23] of an appeal and, after hearing evidence on this subject, to determine from such evidence as to whether Hill was denied his constitutional right to give notice of appeal. If the court is not correct in its interpretation of this order, then the court would be required to pass on the other grounds contained in the peitition which have just been mentioned.

As a matter of precaution, and in order that the other court may have the views of this court, in the event of an appeal, it is the opinion of this court that all of the grounds in the petition, other than ground No. 5, complain of errors of law allegedly committed by the trial court, and that such alleged errors cannot be corrected in a proceeding under title 28 U. S. C. 2255. In other words, this section cannot be used as a substitute for an appeal. See United States v. Haywood, 7th circuit, 207 Fed 2nd 156; United States v. Rosenberg, 2nd Circuit, 200 Fed 2nd 666; United States v. Walker, 2nd Circuit, 197 Fed 2nd 287.

The court concludes that there is no basis in fact or law for vacating the sentences imposed by this court in cases Nos. 10113 and 10114.

It Is, Therefore, Ordered and Adjudged that the motion to vacate be, and the same is hereby, denied.

It Is Further Ordered by the court that petitioner [fol. 24] be returned to the custodial agent of the government who had charge of him at the time he was brought to Chattanooga, or to the custody of the Attorney General of the United States.

Done and Ordered in open court, at Chattanooga, Tennessee, this September 11, 1958.

/s/ Robert Taylor
United States District Judge

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Criminal Cases No. 10113 and No. 10114

JAMES FRANCIS HILL, PETITIONER PRO SE

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER'S DULY VERIFIED AFFIDAVIT OF POVERTY IS HEREON ATTACHED AS PROVIDED BY LAW—
Filed Oct. 21, 1959

• • • •

[fol. 26] Comes now James Francis Hill the petitioner after first being duly sworn, states that he is a citizen of the United States; that, because of his poverty, he is unable to pay the costs of this petition or Motion to Vacate Sentences under Section 2255 of Title 28 U.S.C., or to give security for the same; that he believes he is entitled to the redress he seeks and that said Motion to Vacate Sentences is sought in good faith.

Wherefore, petitioner respectfully prays that he be allowed to docket this proceeding and to proceed in this court without being required to prepay fees or costs or to give security therefor; and for other such pertinent rights and privileges as he may be entitled to receive.

That in forma pauperis under Section 1915 of Title 28 U.S.C. and Section 753 of Title 28 U.S.C. the petitioner be furnished one (1) Certified Copy of Transcript of the Evidence in Cases No. 10113 and 10114 so as to allow the petitioner as an indigent prisoner the right to prove the verity of his allegations that are afforded others able to pay for justice.

Respectfully Submitted

name: James Francis Hill
Petitioner Pro Se
address: P.M.B. 9944-H Springfield, Mo.

STATE OF MISSOURI)
COUNTY OF GREENE) SS:

Sworn to before me and subscribed in my presence this 19th day of October, 1959

Acting Record Clerk

Record Clerk Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004)

[fol. 27]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Criminal Cases No. 10113 and No. 10114

JAMES FRANCIS HILL, PETITIONER PRO SE

v.

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO VACATE SENTENCES UNDER SECTION 2255, TITLE 28 U.S.C. IN FORMA PAUPERIS UNDER SECTION 1915, TITLE 28 U.S.C.—Filed October 21, 1959

STATEMENT OF FACTS
WHY SENTENCES SHOULD BE VACATED

A. Petitioner was deprived of his right to appeal his conviction by the failure of the Clerk of the U.S. District Court for the Eastern District of Tennessee, Southern Division at Chattanooga, Tennessee to properly file and or bring to the attention of the court a notice of appeal in the form of a brief letter which clearly stated the petitioner desired to appeal his conviction in forma pauperis. This said letter was written on or about June 23d, 1954 in Cell No. 13 at the Associate Warden Building in the Atlanta Federal Prison at Atlanta, Georgia and handed to custodial officer on duty at the 4 to 12 P.M. shift for mailing. The petitioner did not receive any answer to this letter which was in effect a notice of appeal under Rule 37 (a)(2) of F.R.Cr.P., Title 18 U.S.C. as it was written within the 10 day period as set forth by Rule 37(a)(2).

[fol. 28] This denial of his appeal right especially when he was an indigent prisoner who had to rely on mail to safeguard this constitutional right was a denial of due process of law under the 5th Amendment. See Boykin v. Huff, 121 F.2d 865 and authorities cited in Brown v. Looney, 249 F.2d 61. The mail records in Atlanta Fed-

eral prison show that petitioner had written a letter to the Clerk of Court during that 10 day period and the letter must be accepted as in effect as of filing a notice of appeal under Rule 37(a)(2) of F.R.Cr.P. 18 U.S.C., See U.S. v. Isabella, 251 F.2d 223 and Jacobanis v. U.S., 256 F.2d 485.

The petitioner would like to point out that due to the extreme mental anguish and disturbances that he had in June, 1954, that the fact he had wrote such a letter completely escaped his memory until he ran across a notation in his legal file recently that Mr. Joseph B. Roberts Court appointed attorney had written that I could raise the question that Judge Robert L. Taylor had referred to a considered letter that Judge Taylor had said was written by the petitioner to the Clerk of the District Court within the 10 days period set for appeal time and that there was no testimony that such letter was written or received.

In going over his movements between June 21 to June 26 of 1954 the petitioner did remember writing a short letter to the Clerk of Court stating his desire to appeal in forma pauperis and that said letter was mailed on or about the 23d of June, 1954, to the Clerk of Court from Atlanta Federal prison and that letter should be [fol. 29] in the records or Court files somewhere now.

B. And in support of the petitioner's allegation of appeal denial, he also alleges that he was denied the right under Rule 32(a) of Federal Rules of Criminal Procedure, Title 18 U.S.C. to have the opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. This provision of Rule 32(a) is jurisdictional and mandatory, and the noncompliance with htat mandatory provision by the trial court deprived the petitioner of due process of law under the 5th Amendment to the United States Constitution and constituted discrimination and a denial of equal justice under law. The Transcript page 8 shows that Judge Darr did not comply with the mandatory provision of Rule 32(a) on June 4, 1954 and that further Judge Darr in prejudicial misconduct signed the Judgment and Commitment papers as complying with Rule 32(a) when in fact he did not do so.

C. Petitioner further alleges he was denied a fair and impartial trial as guaranteed by the 6th Amendment and that he was denied due process of law and forced to be a witness against himself in violation of the 5th Amendment by Judge Darr allowing incriminating statements that petitioner had made to Dr. Norman Graff and other psychiatrists under the provisions of Section 4244 of Title 18 U.S.C. to be brought to the notice of the jury and which prejudiced the petitioner. In fact Section 4244 prohibits any such priveleged statements being brought to the notice of the jury or used as evidence against him, [fol. 30] and in connection with allegation C, Judge Darr prejudicially and in direct violation of petitioner's right to be free from compulsory self-incrimination under the 5th Amendment and in direct violation of the mandatory clause of Section 4244 and in violation of petitioner's right to a fair and impartial trial and to due process of law, instructed the jury in such a way as to bring to the jury's notice that the Court had found the petitioner competent to stand trial.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to attention of the Court." Rule 52(b) Fed. Rules Crim. Proc. 18 U.S.C. and rights as set forth in allegation C cannot be waived. It is clear that under Section 2255 of Title 28 U.S.C. the judgment is open to collateral attack and that there was such a denial and infringement of petitioner's constitutional rights as to render the judgment vulnerable to collateral attack. Although Taylor v. U.S., 222 F.2d 398 is not a case under Section 2255 proceeding it does cover pretty well the Court's duty under Section 4244 of Title 18 U.S.C. and backs up petitioner's contentions on this issue.

D. Petitioner further alleges that he was deprived of a fair and impartial trial under the 6th Amendment and denied due process of law under the 5th Amendment by Judge Darr's improper and prejudicial instructions to the jury of petitioner's defense of insanity as Judge Darr instructed the jury, in face of unalterably opposed of the preponderance of the evidence, that the petitioner had the burden of proof on his shoulders when in fact the

burden had shifted to the government when the petitioner [fol. 31] had shown conclusive proof of prior insanity to the offense. The instruction was a defect affecting substantial rights under Rule 52(b) Fed. Rules Crim. Pro. 18 U.S.C. See Tatum v. U.S., 222 F.2d 398; and cases discussed in Durham v. U.S., 214 F.2d 862 and Stewart v. U.S., 214 F.2d 879.

E. Petitioner further alleges he was denied a fair and impartial trial as guaranteed by the 6th Amendment and denied due process of law under the 5th Amendment as well as forced to be a witness against himself which the 5th Amendment prohibits by the use of the prosecution and under the Court's direction a confession which was extracted from the petitioner by two F.B.I. agents during a period of 72 hours unlawful detention, the confession was unconstitutionally coerced by use of threats, denial of food, water, and psychological brainwashing without a letup until they extracted what they wanted. At no time was petitioner told of his rights to counsel, to keep silent nor was he told he was entitled to a prompt arraignment. All of this took place at the Nassau County Jail in Florida and at the Polk County Jail at Bartow, Florida from 8 A.M. of October 31, 1952 through to November 3, 1952. Petitioner was alone he had no friend or counsel to advise him in such an alien and hostile atmosphere.

The use of that confession was strictly prohibited by [fol. 32] law and the Constitution from being used as evidence to convict the petitioner and the Court was prejudicial in allowing the use of it before the jury. This was clearly an defect affecting petitioner's substantial rights under Rule 52(b) Fed. Rules Crim. Proc. 18 U.S.C.

Under Section 2255 is the only remedy available open to the petitioner to correct the manifest injustice in petitioner's case.

There can be no doubt that such a confession was inadmissible. See McNabb v. U.S., 318 U.S. 332; Brown v. Mississippy, 297 U.S. 278; Symons v. U.S., 178 F.2d 615; and Akowskey v. U.S., 158 F.2d 649.

F. Petitioner further alleges he was denied due process of law under the 5th Amendment and denied a fair and impartial trial, denied witnesses on his own behalf and

denied effective assistance of counsel under the 6th Amendment by: 1, unfavorable publicity, 2 denied witnesses under Section 3005 of Title 18 U.S.C., 3 jury improperly read newspaper and detective magazine stories about the petitioner during the trial, 4 the U.S. Attorney James M. Meek and Judge Darr in front of the jury admitted they read detective stories about the petitioner, 5 The U.S. Attorney prejudicially brought to the notice of the jury previous convictions and crimes of the petitioner, 6 the Court refused to accept as factual evidence that the petitioner was a legally insane person at the time of the offense by virtue of the fact petitioner was an escaped mental patient from January, 1941, to October 31, 1952 and had not been restored legally to sanity at time of [fol. 33] of alleged federal offenses on October 23, 1952 and this fact was prima facie evidence of insanity at time of offenses, 7 petitioner was insane at time of trial and his two Court appointed counsels so testified on September 10, 1958 through Mr. Jack Byron that they felt petitioner was insane and these same two court appointed counsels in drawing up the motion for a new trial alleged petitioner was insane at time of offense and at time of trial. In connection with this allegation the trial court at the sanity hearing on June 2, 1954 prejudicially denied admittance of the fact that petitioner had been ruled insane by the 6th Circuit Court of Appeals in Case No. 11,818 July 7, 1953 Titled Hill v. U.S.

It is inescapable that such a succession of procedural shortcomings and restrictions of petitioner's rights along with the departures from accepted standards of justice was a miscarriage of justice in petitioner's case and he is entitled to redress by remedy of Section 2255, 28 U.S.C.

LAW OF CASES UNDER SECTION 2255 OF TITLE 28 U.S.C.

A sentence may be collaterally attacked when a prisoner convicted under federal law is denied his constitutional right to appeal his conviction.

A sentence can be attacked under Section 2255, Title 28 U.S.C. which provides and the United States Constitution 5th Amendment requires that a District Judge must grant

a hearing, determine the issues and make findings of fact [fol. 34] and conclusions of law.

Both the United States Constitution and 28 U.S.C., Sec. 2255, require that a hearing be granted, to determine whether petitioners right to appeal was abrogated by the negligence of Government employees in failure to treat the letter desiring to appeal in forma pauperis as a notice of appeal of conviction under Rule 37(a)(2) of Title 18 U.S.C. and to notify the petitioner of receipt of the letter.

Petitioner has a constitutional right to a hearing. See Cochran v. Kansas, 316 U.S. 255; Miller 1. Sanford; Hill v. U.S., Case No. 13,520 June 26, 1958.

Petitioner has a statutory right to a hearing and the hearing requisite of this portion of Sec. 2255 must be met, unless records *conclusively* show the falsity of petitioner's allegations. That provisio does not apply here. Interference and denial with a right to appeal a criminal conviction involves facts which are *dehors* the files and records of a case. The difficulty is compounded by the incompletness of "records" in this case, *i.e.*, there is no transcript, only a hearing, involving interrogations of the parties along with the prisoner, could determine the pertinent facts.

But it is beyond argument that records alone cannot *conclusively* establish that petitioner's right to appeal was not obstructed. The Court of Appeals for the 6th Circuit has emphatically required an adherence to this test of conclusiveness. See Howard v. U.S., 186 F.2d 778, 780. [fol. 35] Therefore, the Constitution and Section 2255 require that the petitioner be given a hearing with a determination of the issues, facts and laws and that such a hearing in this case is an adversary inquiry, not ex parte, with petitioner present. See Hayman case (U.S. v. Hayman, 342 U.S. 205), where, as here, there were substantial issues of fact as to events in which the prisoner participated, the Court should require his production for a hearing." (342 U.S. at 223.)

Section 2255 requires it in this case and must be adhered to.

The concept of *res judicata* does not apply to habeas corpus proceedings. *Waley* v. *Johnson*, 316 U.S. 101, 105. The same therefore, is true of Section 2255. Until there is a judicial finding on this denial of petitioner's right to appeal on the acceptance of that letter as a notice of appeal, *res judicata* may not be invoked by the Government. See *Doud* v. *U.S. ex rel Cook*, 340 U.S. 206 at page 208.

The absence of a *finding* by the State Court precluded a *res judicata* defense by the State.

Nor does it make any difference that Sec. 2255 provides that a sentencing Court shall not be required to "entertain a second or successive motion for similar relief."

Petitioner has alleged grounds that entitle him to a [fol. 36] hearing. Until there is a hearing, the "successive motion" proviso is no excuse. (See *Hallowell* v. *U.S.*, 197 Fed. 2d, 926, 928.)

Petitioner must, therefore, be given his hearing under the U.S. Constitution and Section 2255.

Conclusion

This Court must issue a writ of habeas corpus ad testicandum and order the U.S. Marshal to serve it upon the Wardenof the U.S. Medical Center for custody of the petitioner so that petitioner can have the opportunity to prove the verity of his allegations by an adversary proceeding and not ex parte proceeding. The District Judge must determine the issues, and make findings of fact and law.

Respectfully Submitted

signed. James Francis Hill
Petitioner Pro Se

STATE OF MISSOURI)
COUNTY OF GREENE) SS:

AFFIDAVIT OF VERIFICATION

I, James Francis Hill being first duly sworn, do state that the matters stated in the foregoing petition by me subscribed are true as I verily believe.

Respectfully Submitted

signed, James Francis Hill
Petitioner Pro Se
address: P.M.B. 9944-H Springfield, Missouri

Sworn to before me and subscribed in my presence this 19th day of October, 1959

/s/ W. L. Tappana
Acting Record Clerk

Record Clerk Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004)

[fol. 37] AFFIDAVIT OF SERVICE
(Omitted in Printing)

[fols. 38-40] • • • •

[fol. 41] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

[Title omitted]

RESPONSE OF UNITED STATES OF AMERICA TO PETITIONER'S MOTION TO VACATE SENTENCES—Filed Jan. 7, 1960

Now comes the United States of America by John C. Crawford, Jr., United States Attorney for the Eastern District of Tennessee, and for response to petitioner's motion to vacate sentences says:

On June 4, 1954, petitioner was convicted by a jury under separate indictments for transporting in interstate commerce a stolen motor vehicle and also a person who had theretofore been kidnapped and held for ransom, and on the same date a sentence of 20 years for the kidnapping offense and a sentence of 3 years for the motor vehicle offense, to run consecutively, were imposed. On June 9, 1954, a motion for a new trial was filed. On June 15, 1954, with the petitioner present, the motion was heard and denied by the Court. No appeal was taken.

On October 18, 1954, petitioner filed proceedings in the district court to vacate the judgment under Section 2255, Title 28, U.S.C., which the District Judge dismissed. The Court of Appeals affirmed. *Hill* v. *United States*, 223 F2 699, cert. den. 350 U.S. 867.

On March 15, 1956, petitioner again filed a motion to vacate sentence which was denied by the District Judge and judgment affirmed by the Court of Appeals. *Hill* v. *U.S.*, 238 F2 84, cert. den. 352 U.S. 1007.

On December 19, 1957, petitioner again filed a motion to vacate his said sentences, which motion was denied by the District Judge, and on appeal was remanded by the Court of Appeals for a hearing on certain factual [fol. 42] issues. *Hill* v. *U.S.*, 256 F2 957. A hearing was held in September, 1958, requiring two days and consisting of testimony contained in 264 pages of the tran-

script, during which petitioner was given a full opportunity to raise not only the issues involved in that particular motion but also those raised in previous motions. On September 11, 1958, the trial court denied petitioner's motion. On appeal, the judgment was affirmed. *Hill* v. *U. S.*, 268 F2 203, cert. den. 361 U. S. 854. The mandate in this action was received and filed by the Clerk October 28, 1959.

Previous to the receipt by the Clerk of said mandate, petitioner on October 21, 1959, filed his fourth motion to vacate sentence; on November 16, 1959, filed an amendment to said motion; and has transmitted letters to the Court, one dated November 20, 1959, and the other dated December 4, 1959, pertaining to his said motion.

It would appear that all of the questions which petitioner could raise in a proceeding under Section 2255, Title 28, U.S.C., have been previously determined, and it being well settled that such a proceeding cannot be used as a substitute for an appeal. The matter of petitioner's deprivation of the right of appeal was thoroughly gone into at the hearing held September 10-11, 1958. At that hearing petitioner testified that he was present on June 15, 1954, at the time his motion for a new trial was heard and overruled and that he knew at that time that he had 10 days under Rule 37, Federal Rules of Criminal Procedure, in which to appeal. His contention at said hearing, and he so testified, was to the effect that during the 10-day period following the denial of his motion for a new trial on June 15, he was deprived of an opportunity to prepare and file a notice of appeal, which notice he knew had to be filed during that period.

Petitioner in his instant motion alleges that he was deprived of his right to appeal his convictions by the failure of the Clerk of this Court to file and/or bring to the attention of the Court a notice of appeal which was in the form of a letter written by petitioner on or about June 23, 1954, at the United States Penitentiary, Atlanta, [fol. 43] Georgia, and addressed to the Clerk of the United States District Court for the Eastern District of Tennessee, Southern Division, at Chattanooga, Tennessee, which letter he alleges was in effect a notice of appeal

under Rule 37(a)(2) of Federal Rules of Criminal Procedure.

Respondent denies the truth of this allegation. A meticulous examination of the files and records in the office of the Clerk, including those recently returned by the Clerk of the United States Court of Appeals at Cincinnati, fails to disclose the receipt of any such letter by the Clerk. A sworn statement dated December 30, 1959, by W. H. York, Acting Warden of the United States Penitentiary, Atlanta, Georgia, attached hereto and designated Exhibit 1, states that a review of the petitioner's file at that institution does not reveal that such letter was written or handed to a custodial officer, or that petitioner wrote any letter addressed to the District Court during the period June 15 to June 30, 1954. The sworn statement of W. L. Tappana, Records Control Supervisor of the Medical Center for Federal Prisoners, Springfield, Missouri, where petitioner is now incarcerated, dated December 31, 1959, attached hereto and designated Exhibit 2, states that he reviewed the instittuion files covering petitioner and found no record of any communication addressed to the Clerk of the United States District Court at Chattanooga, Tennessee, during the period June 15 to June 30, 1954.

The said motion to vacate sentences, that is the motion filed October 21, 1959, recites:

"The petitioner would like to point out that due to the extreme mental anguish and disturbances that he had in June, 1954, that the fact he had wrote such a letter completely escaped his memory until he ran across a notation in his legal file recently that Mr. Joseph B. Roberts Court appointed attorney had written that I could raise the question that Judge Robert L. Taylor had referred to a considered letter that Judge Taylor had said was written by the petitioner to the Clerk of the District Court within the 10 days period set for appeal time and that there was no testimony that such letter was written or received.

[fol. 44] "In going over his movements between June 21 to June 26 of 1954 the petitioner did remember writing a short letter to the Clerk of Court stating his desire to

appeal in forma pauperis and that said letter was mailed on or about the 23d of June, 1954, to the Clerk of Court from Atlanta Federal prison and that letter should be in the records, or Court files somewhere now."

The attention of this Court, however, is directed to a letter dated October 15, 1958, from the petitioner to Mr. Byron Pope, Clerk, United States District Court, P. O. Box 591, Chattanooga 1, Tennessee, which is contained in the Clerk's file and which among other things recites as follows:

"Mr. Robert wrote on a paper that I did not discover until the other day that Judge Taylor referred to a letter I had written to you within the ten day period and that there was no testimony offered on that. It could be possible I did write such a letter to you and referred to wanting to appeal. It is remote but still possible I did from Atlanta between June 4 to June 26, 1954, or from Hamilton County Jail between June 4 and June 7, 1954, before being sent to Atlanta as I had no pencil or pen or paper or envelopes and stamps from June 14 after arriving at Hamilton County Jail till June 18, 1954, when I went back to Atlanta Fed. Prison. If I did write such a letter I do not actually remember it but there is a remote possibility I could have and if so it is still in the Court records and would be prima facie evidence that I did not waive my right to appeal."

The petitioner stated in this letter that he had no recollection of having written such a letter to the Clerk, and his reference in the above dated letter "that Judge Taylor referred to a letter I had written to you within the ten day period" had reference to this Court's order filed September 11, 1958, which contained the following recital:

"He had access to pencils and paper to write and mail letters from the prison during this period, one of which was mailed to Judge Darr on June 14, 1954, and filed as Exhibit No. 1 in the record. Letters of this character could have been written by Hill to the Clerk during the 10-day period after the motion for a new trial was over-[fol. 45] ruled." (Transcript of September 1958 hearing,

page 269). The letter dated June 14, 1954, from petitioner to Judge Leslie R. Darr, which was filed by the government as Exhibit 1 at said hearing (see transcript pages 61 and 62) was the only letter mentioned by this Court at said hearing, although the Court pointed out that petitioner had an opportunity to write a letter to the Clerk during the 10-day period, had he chosen to do so.

Respondent further says that petitioner's motion, including amendments, is without merit, that the presence of the petitioner for a hearing is unnecessary because he can produce no evidence that a letter in the nature of a notice of appeal was transmitted by him to the Clerk of this Court during the 10-day period except his own possible testimony to the effect that he did write such a letter but such testimony, if made, would be refuted by the statements made in the letter to the Clerk set out above, and said motion should be overruled.

/s/ John C. Crawford, Jr.
United States Attorney

CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 46] EXHIBIT 1 TO RESPONSE

Received Dec. 3, 1959, U. S. Attorney's Office,
Eastern District of Tenn. 12345

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
UNITED STATES PENITENTIARY
Atlanta, Georgia

December 30, 1959

Mr. John C. Crawford, Jr.
U. S. Attorney
Knoxville, Tennessee

Dear Mr. Crawford:

In response to your telephone call, I have personally reviewed the file that we have at this institution on James Francis Hill, No. 74956-A.

Hill alledges that he wrote a letter addressed to the Clerk of the District Court, Chattanooga, Tennessee on or about January 23, 1954. He further alledges he handed the letter to a Custodial Officer who was on duty from 4:00 to 12:00 P. M. in the Associate Warden's Building where he was confined. I can find nothing in the file to show that Hill wrote such a letter and there is nothing in the file to indicate he handed such letter to the Custodial Officer.

Furthermore, nothing in our file indicates that he wrote a letter to the District Court at any time during the period June 15, to June 30, 1954.

Sincerely yours,

/s/ W. H. York
W. H. YORK
Acting Warden

WHY:lt

Sworn to and subscribed before me
this 30th day of December, 1959

(SEAL) /s/ Louis J. Barta
Notary Public, Georgia State at Large
My Commission Expires May 7, 1961

[fol. 47] EXHIBIT 2 TO RESPONSE

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

MEDICAL CENTER FOR FEDERAL PRISONERS
Springfield, Missouri

December 31, 1959

I certify that as Records Control Supervisor, Medical Center for Federal Prisoners, Springfield, Missouri, I am the custodian of official institution records covering James Francis Hill, Register number 9944-H.

I further certify that I have reviewed the institution files covering James Francis Hill and have found no record of any communication addressed to the Clerk, U.S. District Court, Chattanooga, Tennessee during the period June 15, 1954 to June 30, 1954.

/s/ W. L. Tappana
W. L. TAPPANA
Records Control Supervisor

Subscribed and sworn to before me, a Notary Public, this 31st day of December, 1959.

(SEAL) /s/ Robert R. Crockett
Notary Public,
Greene County, Missouri

My commission expires April 22, 1960.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT ~~OF TEN~~NESSEE
SOUTHERN DIVISION

Criminal Nos. 10,113, 10,114

JAMES FRANCIS HILL, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM AND ORDER—Filed Jan. 14, 1960

Petitioner, James Francis Hill, has filed another motion, supported by brief, to vacate the sentences in these cases. The motion was filed on October 21, 1959 and amended November 16, 1959. The motion, as amended, was filed pursuant to Section 2255 of Title 28, U.S.C. Upon receipt of the motion, the Clerk was directed to turn over the files to the United States District Attorney for the Eastern District of Tennessee for response. The response was filed on January 7, 1960 and the matter is now before the Court for determination.

The sentences were pronounced by Judge Leslie R. Darr on June 4, 1954. Petitioner first filed a motion to vacate, based on Section 2255 of Title 28, U.S.C., on October 18, 1954, which was dismissed by the District Judge and affirmed by the Court of Appeals. 223 Fed. 2d. 699, cert. denied 350 U. S. 867.

Another motion was filed on March 15, 1956 and again denied by the District Court and the judgment affirmed. 238 Fed. 2d. 84, cert. denied 352 U. S. 1007.

On December 19, 1957 still another motion to vacate was denied by the District Court, but on appeal was remanded for a hearing on factual issues. 256 Fed. 2d. 957.

The hearing was held pursuant to the mandate of the Court of Appeals in Chattanooga beginning September [fol. 49] 10, 1958 and ending the following day. At the conclusion of this hearing, at which the Judge who has

prepared this Memorandum and Order presided, detailed findings of fact and conclusions of law were made and the motion dismissed. (Tr. 265 et seq.) The action of the District Court was affirmed by the Appellate Court. 268 Fed. 2d. 203, cert. denied 361 U. S. 854.

Petitioner's principal claim in the September 1958 hearing was that the employees of the Hamilton County Jail, in which he was incarcerated for a short time following the rendition of the sentences, and the agents, representatives and custodians of the Atlanta Prison, that being the institution to which he was taken from the Hamilton County Jail, refused him the right to give notice of his appeal during the ten-day period that followed the action of the District Court in overruling his motion for a new trial.

In the present motion, petitioner claims that he gave notice of his appeal within the ten-day period to the Clerk of the United States District Court for the Eastern District of Tennessee and the Clerk failed to file it or bring it to the attention of the Court.

Petitioner's brief in support of the motion indicated that petitioner got the idea that the District Court felt that he wrote or may have written a letter to the Clerk, within the ten-day period as provided by the applicable rule, giving notice of his appeal from the sentences. The pertinent language used by the Court is:

> "He (petitioner) had access to pencils and paper to write and mail letters from the prison during this period, one of which was mailed to Judge Darr on June 14, 1954, and filed as Exhibit No. 1 in the record. Letters of this character could have been written by Hill to the clerk during the ten-day period after the motion for new trial was overruled." (Tr. 269.)

The Court used this language to support its conclusion that the petitioner did not give and was not deprived of giving a notice of appeal within the ten-day period following the rendition of the sentences and that he was not deprived of any constitutional rights.

[fol. 50] The other questions made by petitioner in the present petition were made in the petition upon which the

Court passed in the September 1958 hearing and found to be lacking in merit. In that connection, the Court said:

> "It is this court's interpretation of the Court of Appeals' opinion that the case was remanded to this court for the sole purpose of hearing evidence on the question of whether or not Hill was denied his right to give notice of an appeal and, after hearing evidence on this subject, to determine from such evidence as to whether Hill was denied his constitutional right to give notice of appeal. If the court is not correct in its interpretation of this order, then the court would be required to pass on the other grounds contained in the petition which have just been mentioned.
>
> As a matter of precaution, and in order that the other court may have the views of this court, in the event of an appeal, it is the opinion of this court that all of the grounds in the petition, other than ground No. 5, complain of errors of law allegedly committed by the trial court, and that such alleged errors cannot be corrected in a proceeding under title 28, U. S. C. 2255 . . ." (Tr. 271, 272)

The petitioner was given full opportunity in the September 1958 hearing to raise the question that he raises in his present motion. The present motion asks similar relief to that asked in the motion which was heard in the September 1958 hearing as well as in previous motions.

The Court has re-examined the motion and is of the opinion and finds that the files and records in the case conclusively show that petitioner is not entitled to relief; that he has not been deprived of any constitutional right; and, that his presence is not necessary for a hearing on the motion filed October 21, 1959 and amended November 16, 1959.

A separate order has this day been passed to the Clerk denying petitioner's motion, as amended.

/s/ Robert Taylor
United States District Judge

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Criminal Nos. 10,113, 10,114

JAMES FRANCIS HILL, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER DENYING MOTION—January 14, 1960

For the reasons indicated in Memorandum this day passed to the Clerk, it is ORDERED that petitioner's motion, filed on October 21, 1959 and amended November 16, 1959, be, and same hereby is, denied.

Enter:

/s/ Robert Taylor
United States District Judge

[fol. 52] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—June 14, 1960

The above cause coming on to be heard on the record, the briefs of the parties and the argument of counsel in open court, and the court being duly advised:

Now, therefore, it is ordered, adjudged and decreed that the order of the District Court denying petitioner's motion to vacate sentences be and is hereby affirmed on the opinion of Judge Robert L. Taylor.

Approved for entry:

/s/ Thomas F. McAllister
United States Circuit Judge

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 68

JAMES FRANCIS HILL,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Philadelphia 4, Pa.

Counsel for the Petitioner

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CASES:

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OCTOBER TERM, 1961

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JAMES FRANCIS HILL,

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 45) is reported at 282 F.2d 352 (6th Cir. 1960). The memorandum and order of the District Court (R. 41-44) are reported at 186 F. Supp. 441 (E.D. Tenn. 1959).

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1960 (R. 45). The petition was filed June 30, 1960, and was granted March 20, 1961. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Where the District Court, at the time of imposing sentence upon petitioner, failed to follow the mandatory procedure of Rule 32(a) of the Federal Rules of Criminal Procedure, in that the Court did not afford an opportunity to petitioner, or to his counsel, to make a statement in his own behalf or to present any information in mitigation of punishment, is petitioner entitled to relief in the proceeding he has now brought?

Rules and Statute Involved

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

> (a). Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may correct an illegal sentence at any time.

Section 2255 of the Judicial Code, 28 U.S.C. §2255, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdic-

tion to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained

if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement

Petitioner seeks relief from an illegal sentence imposed by the United States District Court for the Eastern District of Tennessee on June 4, 1954, under separate indictments for transporting a stolen motor vehicle in interstate commerce and for transporting across State lines a person who had been kidnapped and held for ransom. Consecutive sentences of 20 years for the kidnapping offense and of 3 years for the motor vehicle offense were imposed (R. 20). There was no appeal.[1]

Petitioner filed a "Motion to Vacate Sentences Under Section 2255, Title 28 U.S.C." on October 21, 1959, in the

[1] The lack of appellate review of the convictions and sentence has itself been the basis of repeated attempts at post-conviction relief by petitioner. In a motion to vacate and set aside sentence under §2255, filed December 17, 1957, petitioner contended that he was prevented by government agents from appealing his original conviction. In the present proceeding, this contention was renewed together with an allegation that petitioner had in fact sent a letter from prison which was in effect a notice of appeal. The limited grant of certiorari eliminated this question from the present proceeding. At the original trial, petitioner was represented by court-appointed counsel (Document 20 of unprinted record; see note 3 *infra*), who filed and argued a motion for new trial but did not file a notice of appeal or take any steps toward perfecting an appeal (R. 3, 11). In his 1955 motion for leave to file a petition for habeas corpus in this Court, *Hill* v. *United States*, No. 373 Misc., October Term 1955, denied, 350 U.S. 946 (1956), petitioner alleged that his trial attorneys refused to appeal because they said they were court-appointed counsel and could not give free time to petitioner's case.

sentencing court, the Eastern District of Tennessee[2] (R. 26-33). This motion, filed by the petitioner *pro se*, alleged several grounds for relief, but in view of this Court's limited grant of certiorari the one now important was the contention

> " . . . that he was denied the right under Rule 32(a) of the Federal Rules of Criminal Procedure, Title 18 U.S.C. to have the opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. . . . The Transcript page 8 shows that Judge Darr did not comply with the mandatory provision of Rule 32(a) on June 4, 1954 and that further Judge Darr in prejudicial misconduct signed the Judgment and Commitment papers as complying with Rule 32(a) when in fact he did not do so" (R. 27).

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[2] This was the fourth such motion filed by petitioner. His first motion, filed October 18, 1954 (R. 3, 11), a few months after his trial, was denied nine days later (R. 3). The Court of Appeals affirmed. *Hill* v. *United States*, 223 F.2d 699 (6th Cir. 1955) (R. 4, 12), cert. denied, 350 U.S. 867 (1955). Petitioner next filed a motion for leave to file a petition for writ of habeas corpus in this Court on November 17, 1955. No. 373 Misc., October Term 1955. This motion was denied. *Hill* v. *United States*, 350 U.S. 946 (1956). On March 15, 1956, petitioner filed his second motion under §2255 in the trial court (R. 4, 12). This was denied six days later (R. 4, 12), and the Court of Appeals affirmed. *Hill* v. *United States*, 238 F.2d 84 (6th Cir. 1956) (R. 4, 12), cert. denied, 352 U.S. 1007 (1957). Petitioner's third motion to vacate sentence was filed on December 19, 1957 (R. 5, 12). The District Court denied the motion on January 10, 1958 (R. 5, 12). On appeal, the Court of Appeals remanded for a hearing. *Hill* v. *United States*, 256 F.2d 957 (6th Cir. 1958) (R. 5, 13). Thereupon, petitioner filed an affidavit of prejudice on July 21, 1958 (Document 38 of the unprinted record; see note 3, *infra*), and Judge Leslie R. Darr, who had presided at the trial and all prior proceedings in the District Court, recused himself. After the United States had filed a Response (R. 5, 13), a hearing was held before Judge Robert Taylor on September 10 and 11, 1958 (R. 6, 13-14). From Judge Taylor's denial of his motion, petitioner appealed; the Court of Appeals affirmed. *Hill* v. *United States*, 268 F.2d 203 (6th Cir. 1959) (R. 7, 15), cert. denied, 361 U.S. 854 (1959).

The United States filed a Response to this motion on January 7, 1960 (R. 34-40). Nothing in the response was addressed specifically to petitioner's contention of a violation of Rule 32(a). The only portion conceivably relevant was this general assertion:

> "It would appear that all of the questions which petitioner could raise in a proceeding under Section 2255, Title 28 U.S.C., have been previously determined, and it being well settled that such a proceeding cannot be used as a substitute for an appeal" (R. 35).

One week later, without having held a hearing, the District Court denied the motion (R. 44). In a Memorandum accompanying the Order (R. 41-43), the District Court did not deal with the contention of a violation of Rule 32(a) directly. This issue was disposed of as follows:

> "The other questions made by petitioner in the present petition were made in the petition upon which the Court passed in the September 1958 hearing and found to be lacking in merit" (R. 42-43).

The September 1958 proceeding referred to an earlier motion by this petitioner for relief under §2255. Instituted on December 19, 1957 (R. 3), this motion had alleged the violation of Rule 32(a) among other errors. (Document No. 32 in unprinted record.)[3] In that proceeding, the United States filed a response on August 27, 1958, in part as follows:

> "Respondent denies the truth of petitioner's allegation No. 2, and contrary to the allegation respondent avers that at the time of the imposition of the sen-

[3] By a stipulation of counsel, dated May 9, 1961, now in the files of this case, it was agreed that the parties may refer to the full record on file in this Court, including any part thereof which has not been printed.

> tences the District Judge specifically inquired of the petitioner whether or not he had anything to say before sentence was imposed and that the petitioner replied that he had nothing to say." (Document No. 40 in unprinted record.)[3]

This direct clash of factual assertions was never resolved. While a hearing was held, it was limited to petitioner's contention that he had been denied the right to give notice of an appeal from his 1954 conviction. The District Court disposed of the Rule 32(a) contention, along with other claims, on the ground that "such alleged errors cannot be corrected in a proceeding under Title 28, U.S.C. 2255" (R. 23, 43).

Thus, when the District Court, in the present proceeding, denied the motion upon the ground that the contention under Rule 32(a) had been found to be "lacking in merit" earlier, the Court was simply reaffirming its 1958 decision that the claim could not be advanced in a §2255 proceeding. The Court of Appeals for the Sixth Circuit, in a brief *per curiam* order, affirmed on the opinion of the District Judge (R. 45).

Despite the unqualified assertion of the United States in its response to the 1958 motion, it is clear beyond any question that petitioner was sentenced in violation of Rule 32(a). The transcript of Charles M. Fain, the Official Court Reporter, shows that, when the case was called for judgment on June 4, 1954, there was no interchange whatsoever between the Court and the defendant, or his counsel.[4] The following is the complete record of what transpired:

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[3] See preceding page for footnote 3.

[4] To eliminate any possible confusion, it must be noted that the Solicitor General's Memorandum, in response to the petition for certiorari in the present proceeding, asserted that there is no transcript of the imposition of sentence in this case. U.S. Memorandum,

"The Court: Does the Government care to say anything?

"Gen'l Davis: The Government does not care to make any statement, your Honor. I think it has been developed in the proof, the character of this defendant and the other crimes which he has committed.

"The Court: I believe the other co-defendant, the adult got seventeen years?

"Gen'l Davis: He received fifteen years on the kidnapping and two years on the Dyer Act. The minor boy received five years in the kidnapping charge and one year and one day on the Dyer Act charge.

"The Court: That is the way I remembered it" (R. 18).

The Court then proceeded to announce his reasons for sentence and the sentence itself. At no point did he ask the defendant whether he wanted to make a statement in his own behalf. At no point did he ask the defendant if he wished to present any information in mitigation of punishment. Nor did he make any such inquiries of counsel for the defendant. Thus, on the face of the record, there is a manifest violation of Rule 32(a).[5]

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p. 3. It was noted that, in March 1958, the District Court had refused petitioner's request for a transcript noting that there was none in existence and that none could be prepared because of the death of the court reporter. The Government was apparently unaware of the fact that, in accordance with 28 U.S.C. §753 which requires without exception that court reporters "shall . . . transcribe and certify all pleas and all proceedings in connection with the imposition of sentence in criminal cases," there was a full transcript of the imposition of sentence in the records of this case then in the possession of the Clerk of the Court of Appeals for the Sixth Circuit. The petitioner himself had referred to this transcript in his motion, *supra*, correctly citing page 8 as the beginning of the sentencing proceedings.

[5] It is relevant, perhaps, to note that the present petition is not the first to rely upon the violation of Rule 32(a). The record shows this issue was also raised in the 1957 motion to vacate sentence. In

ARGUMENT

I

The District Court Clearly Violated the Mandatory Requirements of Rule 32(a) of the Federal Rules of Criminal Procedure by Failing to Provide Petitioner With an Opportunity to Make a Statement in His Own Behalf and to Present Any Information in Mitigation of Punishment.

Rule 32(a) of the Federal Rules of Criminal Procedure, so far as pertinent here, provides:

> "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

It is clear beyond argument that this Rule was breached in the imposition of sentence upon petitioner.

The decision of this Court last Term in *Green* v. *United States*, 365 U.S. 301 (1961), disposes of any doubts as to the meaning of Rule 32(a). Mr. Justice Frankfurter, speaking for himself and Mr. Justices Clark, Harlan and Whittaker, wrote:

> "The design of Rule 32(a) did not begin with its promulgation; its legal provenance was the common-

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his motion for leave to file a petition for writ of habeas corpus, filed in this Court on November 17, 1955, No. 373 Misc., October Term 1955, petitioner alleged that the trial court did not ask him if he had anything to say before sentence was imposed. *Hill* v. *United States*, 350 U.S. 946 (1956). The contention also appears in the affidavit of prejudice filed July 21, 1958 (Document 38 in unprinted record). With due allowance for the fact that petitioner was compelled by the circumstances to draft his own motions and petitions without the assistance of counsel, there is no indication of any lack of diligence or perseverance in the manner of his pressing his claim. And see note 1 *supra*.

law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence." *Id.* at 304.

The Chief Justice, and Mr. Justices Douglas and Brennan joined in an opinion by Mr. Justice Black, who said:

"I agree that Federal Criminal Rule 32(a) makes it mandatory for a federal judge before imposing sentence to afford every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf presenting any information he wishes in mitigation of punishment . . . ." *Id.* at 307.

Only Mr. Justice Stewart had any reservations that Rule 32(a) clearly required a district judge in every case to volunteer to the defendant an opportunity personally to make a statement, when the defendant has a lawyer at his side who speaks fully on his behalf. But Mr. Justice Stewart agreed that it would be better practice to allow the defendant to speak for himself, in addition to anything that his lawyer might say. He would have announced such a rule for prospective operation. *Id.* at 306.

While the Court was substantially unanimous on the interpretation of Rule 32(a) in the *Green* case, it divided sharply on a factual question, and the judgment of the Court affirmed denial of relief. Four Justices held, in the opinion of Mr. Justice Frankfurter, that an ambiguous

inquiry from the bench prior to sentence may well have been addressed to the defendant rather than to his counsel and, accordingly, the defendant failed to meet his burden of proof. This view of the factual question, coupled with Mr. Justice Stewart's conclusion that legally the rule should operate prospectively in this situation, resulted in an affirmance.

In the present case, however, the violation of Rule 32(a) is clear and unequivocal on the face of the record. The District Court did not ask anyone other than counsel for the Government to speak prior to imposition of sentence (R. 18). Counsel for the defendant, while present, was not invited to speak and did not say a word. The doubt which troubled Mr. Justice Stewart, concerning the meaning of Rule 32(a) "when the defendant has a lawyer at his side who speaks fully on his behalf," is not raised in this case. Nor is there any room for factual disagreement in the interpretation of the District Court's actions. There was no opportunity given to the defendant or to his counsel to make a statement in behalf of the defendant or to present information in mitigation of punishment. *Cf. Taylor* v. *United States*, 285 F.2d 703 (9th Cir. 1960).

II

Petitioner Is Entitled to Relief From This Violation of Rule 32(a) in a Proceeding for Correction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure.

The conclusion that there has been an indubitable violation of Rule 32(a) brings us to the question which was expressly left open in the opinion of Mr. Justice Frankfurter in *Green* v. *United States*, *supra*. That is, accepting the fact of a violation of the Criminal Rules, what, if any, relief is available to redress the wrong which has occurred?

Petitioner submits, first, that he is entitled to relief from the illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure.

Preliminarily, it may be noted that the order of this Court granting the petition for certiorari expressly limited the cause to "the question of whether petitioner may raise his claim under Federal Criminal Rule 32(a) in the proceeding which he has now brought" (R. 46). As has been set out, petitioner instituted the present proceeding by a motion to vacate sentences, clearly labelled as based upon 28 U.S.C. §2255 (R. 26). However, there is substantial authority permitting cases originally instituted under §2255 to be treated as arising under Rule 35 where it is or may be advantageous to the prisoner to do so. *Heflin* v. *United States*, 358 U.S. 415 (1959); *Bayless* v. *United States*, 288 F.2d 794 (9th Cir. 1961); *Baker* v. *United States*, 271 F.2d 190 (8th Cir. 1959); *May* v. *United States*, 261 F.2d 629 (9th Cir. 1958), cert. denied, 359 U.S. 994 (1959); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *United States* v. *Bradford*, 194 F.2d 197 (2d Cir. 1952), cert. denied, 343 U.S. 979 (1952); *United States* v. *Hough*, 157 F. Supp. 771 (S.D. Cal. 1957). It seems appropriate to treat this Court's phrase "the proceeding which he has now brought," to mean a proceeding seeking post-sentence relief either under §2255 or Rule 35.

The four Justices who joined the opinion of Mr. Justice Black in the *Green* case stated no reservations as to the availability of relief under Rule 35 of the Rules of Criminal Procedure. The only pertinent part of that rule is the first sentence: "The court may correct an illegal sentence at any time." These four Justices concluded that a sentence imposed in violation of Rule 32(a) is an illegal sentence. Mr. Justice Frankfurter's opinion, finding no violation of Rule 32(a), concluded: "we therefore find that his

sentence was not illegal." 365 U.S. at 305. This opinion, however, rested on the assumption, stated at the outset, "that this inadequacy in the circumstances now before us would constitute an error *per se* rendering the sentence illegal." *Id.* at 303.

A. Rule 35 Provides a Remedy for Illegality, Not Only in the Content of the Sentence, But Also in the Procedure Whereby Sentence Is Imposed.

The question thus presented is the scope of Rule 35, i.e., the meaning of "illegal sentence." Not surprisingly, most of the cases have dealt with the length of the sentence imposed. *E.g., Callanan* v. *United States*, 364 U.S. 587 (1961); *Heflin* v. *United States*, 358 U.S. 415 (1959); *Prince* v. *United States*, 352 U.S. 322 (1957); *Smith* v. *United States*, 287 F.2d 270 (9th Cir. 1961); *United States* v. *Drake*, 250 F.2d 216 (7th Cir. 1957); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *Ekberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948). In most of these cases, the illegality was a sentence which exceeded the authorized statutory maximum because consecutive sentences had been imposed on multiple counts whereas only one offense had been committed.

By no means can it be said, however, that a sentence is illegal only if it exceeds in content the statutory maximum set down by Congress. In one of the first cases decided under Rule 35, *Simunov* v. *United States*, 162 F.2d 314 (6th Cir. 1947) the Court of Appeals for the Sixth Circuit granted relief to a prisoner, whose sentence was clearly within the limits set by the legislature, because the District Court had been ambiguous in stating the sentences on several counts. One of the charges, kidnapping connected with the perpetration of a bank robbery, would have supported the total sentence. The Sixth Circuit reduced the

sentence from sixty-five to twenty-five years because the sentencing judge had left it unclear whether he intended to impose more than twenty-five years for the kidnapping charge. The source of the illegality was the ambiguous manner in which the sentence had been announced.

There have been other instances in which a sentence has been held illegal, or a charge of illegality entertained under Rule 35, where the defect has come in the procedure at the sentencing proceeding. In one of the most authoritative court of appeals opinions on Rule 35, *Cook* v. *United States*, 171 F.2d 567 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949), a sentence was imposed in the absence of the defendant. This, of course, violated Rule 43 of the Rules of Criminal Procedure, which provides that "the defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." This error occurred when the district court discovered that, in originally imposing sentence, it had failed to impose a mandatory fine as well as imprisonment. Belated efforts to correct that error led to a sentence in the absence of the defendant. It was agreed on all sides that such a sentence was illegal and could be corrected. See also *Gilliam* v. *United States*, 269 F.2d 770 (D.C. Cir. 1959).

The Seventh Circuit recently entertained a Rule 35 motion where the illegality in the sentence was said to arise from failure of the district court to comply with Rule 32(c), which requires a presentence report before the imposition of sentence. *Garfinkel* v. *United States*, 285 F.2d 548 (7th Cir. 1960), cert. denied, 365 U.S. 879 (1961).

In 1947, the Eighth Circuit had before it a contention that a judgment and sentence were invalid because the defendant had been insane at the time of trial and sentencing.

Byrd v. *Pescor*, 163 F.2d 775 (8th Cir. 1947), cert. denied, 333 U.S. 846 (1948). The prisoner sought relief by writ of habeas corpus. The Court of Appeals held that habeas corpus was an inappropriate remedy unless and until relief was sought under Rule 35, which was available to vacate or correct a sentence because of such illegality. See also *D'Ostroph* v. *Pescor*, 7 F.R.D. 569 (W.D. Mo. 1947), appeal dismissed, 173 F.2d 897 (8th Cir. 1949), cert. denied, 337 U.S. 926 (1949); *Brown* v. *Pescor*, 74 F. Supp. 549 (W.D. Mo. 1947). While the irregularity in these cases is not governed by a specific rule in the Rules of Criminal Procedure, they are instances of the application of Rule 35 to a defect in the manner of imposition of sentence rather than in the sentence *per se*.[6]

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[6] Indeed there have been some courts which have employed Rule 35 in cases which challenged proceedings going to the propriety of the convictions rather than merely the sentences. The *Byrd* case, *supra*, in part raises the matter of insanity at the trial as well as sentencing. In *Griffin* v. *United States*, 173 F.2d 909 (6th Cir. 1949), the Sixth Circuit granted relief under Rule 35 to a prisoner whose primary contention was that his indictment was insufficient for failing to allege that his violation had been "knowingly" committed. While the Court of Appeals on rehearing seemed to merge and confuse the remedies under §2255 and Rule 35, 175 F.2d 192 (6th Cir. 1949), several years later the same court declared that its decision in *Griffin* had rested solely on Rule 35. *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957). See also *United States* v. *Thompson*, 261 F.2d 809 (2d Cir. 1958), cert. denied, 359 U.S. 967 (1959), where the Second Circuit reviewed the sufficiency of the evidence to support a conviction in light of a recent decision by this Court which sharpened and refined the definition of summary contempt. The court said that ". . . it seems clear that the motion is broadly available to correct an injustice in a conviction or sentence." *Id.* at 810. But the more orthodox view is that of Judge Calvert Magruder, who said that a Rule 35 motion presupposes a valid conviction. *Cook* v. *United States*, 171 F.2d 567, 570 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949). See also *United States* v. *Morgan*, 346 U.S. 502, 506 (1954); *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957); *Fooshee* v. *United States*, 203 F.2d 247, 248 (5th Cir. 1953); *In re Shepherd*, 195 F.2d 157, 158 (1st Cir. 1952). *Cf. Baker* v. *United States*, 271 F.2d 190, 192 (8th Cir. 1959); compare *Montos* v. *United States*, 261 F.2d 39 (7th Cir. 1958); *Corcoran* v. *United States*, 231 F.2d 449, 451 (7th Cir. 1957).

B. The History of Rule 35 of the Rules of Criminal Procedure Is Consistent With Its Use to Correct Sentences Which Are Illegal Because of the Manner in Which They Are Imposed.

Rule 35 was among the group of Rules, Nos. 32 through 39, which were promulgated by this Court on February 8, 1946, their effective date to coincide with the effective date of the remainder of the Rules of Criminal Procedure. These eight rules rested upon an earlier authorization of rule-making power from Congress, 47 Stat. 904 (1933), as amended by 48 Stat. 399 (1934), and superseded the Criminal Appeals Rules first issued by this Court on May 7, 1934. See 292 U.S. 661. There was, however, no express provision in the Criminal Appeals Rules of 1934 comparable to the first sentence of Rule 35. The text of the rule, as such, dates only from 1946.

Professor George H. Dession, a member of this Court's Advisory Committee on Criminal Rules, described the background of the rule in 1946 in these terms:

> "Rule 35 is new so far as an express rule goes. It deals with correction of error and reduction of sentence. Now of course a court had the power before to correct an illegal sentence at any time, and sentence could pretty clearly be reduced during the term, but this rule expressly states that an illegal sentence may be corrected at any time . . . ." Proceedings of the New York University School of Law Institute on the Federal Rules of Criminal Procedure, February 15 and 16, 1946, at 207.

The Note of the Advisory Committee, published with the Rules, declares that: "The first sentence of the rule continues existing law."

Nowhere does there appear an official statement by the Advisory Committee as to what elements of existing law were continued. As the distinguished Chairman of the Advisory Committee, Arthur T. Vanderbilt, noted, speaking of the period prior to 1946, "our Federal criminal procedure has been chaotic," but he said that the new Criminal Rules "reduce to a workable compass what was a perfect wilderness of precedent before the Rules were drafted." Proceedings of the Catholic University of America School of Law Institute on the Federal Rules of Criminal Procedure, Washington, D. C., Oct. 16, 1945, 5 F.R.D. 88, 94.

There was considerable confusion in the lower federal courts on the scope of their power to deal with sentences after the conclusion of the term of court at which sentences were imposed. Under the influence of *United States* v. *Mayer*, 235 U.S. 55 (1914); *Phillips* v. *Negley*, 117 U.S. 665 (1886); *Bronson* v. *Schulten*, 14 Otto 410, 104 U.S. 410 (1882); and *Pickett's Heirs* v. *Legerwood*, 7 Pet. 147 (1833), it was widely believed that the only relief available after the term had ended was through habeas corpus, and that writ did not lie in the court imposing sentence. The term principle was strongly reinforced, with regard to the power of the trial court to grant a motion for new trial, in *United States* v. *Smith*, 331 U.S. 469 (1947). Eventually, in 1954, this Court held squarely for the first time that relief in the nature of the common-law writ of error coram nobis, a remedy in the sentencing court, was available in a criminal case in the federal courts. *United States* v. *Morgan*, 346 U.S. 502 (1954).

The principal case widening the power of the sentencing court to correct errors after the term had passed was *Holiday* v. *Johnston*, 313 U.S. 342 (1941). The case had been instituted by a prisoner seeking habeas corpus in the district court in the district where he was confined. One of his

contentions challenged the validity of a consecutive sentence which he had not yet begun to serve. On familiar principles of habeas corpus, he was not entitled to seek relief under the Great Writ. *McNally* v. *Hill*, 293 U.S. 131 (1934). Denying a remedy, this Court stated that the prisoner's proper remedy was an application to the sentencing court for vacation of the sentence and a resentence in conformity with the statute. 313 U.S. at 349. In due course, such a motion was granted. *Holiday* v. *United States*, 130 F.2d 988 (8th Cir. 1942).

An additional influential case in the advent of a motion-type remedy in the same period was this Court's decision in *Steffler* v. *United States*, 319 U.S. 38 (1943). Steffler contended that the indictment did not state an offense against the United States and that he had been denied assistance of counsel at the trial. Holding that an *in forma pauperis* appeal was proper from denial of a motion to set aside judgment of conviction, the Court implied that this type of remedy would lie for such errors at the original trial.

In the lower courts, most of the developments of a motion-type remedy in the sentencing court took place in the early 1940's as a result of the *Holiday* and *Steffler* cases. This trend was given further impetus by the publication of two preliminary drafts of the Advisory Committee on the Criminal Rules. The first of these, in 1943, had the predecessor of Rule 35 as Rule 31(b), which provided that "the court may correct an illegal sentence at any time." The Committee's Note declared that this sentence "states the present law," citing 5 Longsdorf, Cyclopedia of Federal Procedure (1929) §2468. In the Second Preliminary Draft, published in 1944, the same provision was placed in Rule 37, with an identical Committee Note of explanation. Lower courts were thus advised, on persuasive authority, that they possessed the power to correct errors in sentence at any time.

In the brief span of years prior to the effective date of the Criminal Rules, there was a spate of litigation in something like this form of procedure. Of course, relief was made available when a sentence, through consecutive terms on multiple counts for essentially one offense, resulted in an aggregate prison sentence which exceeded the statutory maximum for the single offense. See, e.g., *Coy* v. *United States*, 156 F.2d 293 (6th Cir. 1946), cert. denied, 328 U.S. 841 (1946) (motion to set aside judgment); *Rutkowski* v. *United States*, 149 F.2d 481 (6th Cir. 1945) (motion to vacate sentence); *Miller* v. *United States*, 147 F.2d 372 (2d Cir. 1945) (motion to correct sentence); *Wilson* v. *United States*, 145 F.2d 734 (9th Cir. 1944) (motion to vacate judgment); *Robinson* v. *United States*, 143 F.2d 276 (10th Cir. 1944) (motion to vacate judgment); *Meyers* v. *United States*, 116 F.2d 601 (5th Cir. 1940) (motion for resentence).

At the same time, there was a clear trend toward providing a remedy in the trial court for errors in the sentencing procedure.

In *Peterson* v. *United States*, 39 F.2d 336 (8th Cir. 1930), a prisoner sought relief by writ of error coram nobis on the ground, *inter alia*, that he had been intoxicated at the time of imposition of sentence. The trial court found against the prisoner on the facts and the Court of Appeals affirmed. In *Batson* v. *United States*, 137 F.2d 288 (10th Cir. 1943), a prisoner filed a motion to correct sentence because his counsel had not been present at the time of sentencing. The Tenth Circuit held that the defendant had waived any right he may have had to have counsel present through his failure to protest the absence when asked if he had anything to say.

In *Nivens* v. *United States*, 139 F.2d 226 (5th Cir. 1943), cert. denied, 321 U.S. 787 (1944), rehearing denied, 321 U.S.

804 (1944), the court entertained a motion to correct sentence which asserted that the prisoner had been sentenced on several counts, which had not expressly been announced as consecutive. The prisoner sought to have the sentences treated as concurrent. The contention was denied on the merits, the court holding that the expiration of the term of court at which sentence was imposed does not deprive the court of the power to correct the record to conform to the truth. See also *Buie* v. *United States*, 127 F.2d 367 (5th Cir. 1942), cert. denied, 317 U.S. 689 (1942), rehearing granted, 317 U.S. 703 (1943), cert. denied, 318 U.S. 766 (1943). Compare *Downey* v. *United States*, 91 F.2d 223 (D.C. Cir. 1937).

In *Carrollo* v. *United States*, 141 F.2d 997 (8th Cir. 1944), a motion to vacate sentence challenged the legality of a sentence for income tax evasion which imposed a prison term of three years with a proviso that, if the defendant paid taxes owed before the end of the court's term, the sentence would be modified to one year in prison. The motion asserted that this was a void contingency, but the contention was denied on the merits.

A trend was clearly discernible toward the fashioning of a remedy in the sentencing court for errors not only in the substance of the sentence but also in the procedure of the sentencing as well.

C. Sound Policy in the Administration of Criminal Law Supports Providing Relief Where a Sentence Has Been Imposed in Violation of Rule 32(a).

Compared with the procedural safeguards provided to a criminal defendant prior to his trial and conviction, there are relatively few requirements with respect to the proper manner for imposing sentence. Yet for a great many defendants, the only important facet of their prosecution is the nature and extent of the sentence they will receive. The

right of allocution was a fundamental right at common law. As this Court agreed unanimously in the *Green* case last Term, it is a basic right today. Mr. Justice Frankfurter noted that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." 365 U.S. at 304.

The importance of the right of allocution is underscored in a case like the present one, where the defendant had several previous convictions which were presumably known to the court. This prior record, for the most part compiled in the state courts of Florida, could be explained and mitigated. Petitioner has been and is presently seeking collateral relief from those judgments and, indeed, has already had one set aside. This mitigating evidence, if known to the sentencing court, might have a profound impact upon the sentence imposed.

At the same time, the correction of sentencing errors does not interfere with the primary societal interest in the administration of its criminal laws. The relief asked does not invalidate the underlying conviction. It would never be necessary for the United States to mount a new prosecution, with all the incumbent difficulties of marshalling evidence some time after the event. The sole cost involved is the time of the court in reconsidering sentence and imposing a legal sentence, together with the custodial inconvenience involved in returning a prisoner to the court for resentence. Such matters are trivial in comparison with the basic rights sought to be vindicated on behalf of the prisoner serving an illegal sentence.

III

Petitioner Is, in Any Event, Entitled to Relief From the Illegal Sentence Under 28 U.S.C. §2255.

If this Court should conclude that Rule 35 is not the appropriate remedy for a violation of Rule 32(a), petitioner is nevertheless entitled to relief under 28 U.S.C. §2255. For this argument, petitioner incorporates by reference the argument of the Brief for Petitioner in *Machibroda* v. *United States*, No. 69, October Term 1961.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

CURTIS R. REITZ
Counsel for Petitioner

August 24, 1961

Certificate of Service

I certify that I have served a copy of this Brief for Petitioner upon the Solicitor General of the United States by depositing the same in a United States post office, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C.

CURTIS R. REITZ
Counsel for Petitioner

August 24, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 68

JAMES FRANCIS HILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 69

JOHN MACHIBRODA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the court of appeals in *Hill* (H.R. 45) [1] is reported at 282 F. 2d 352. The memorandum of the district court (H.R. 41-43) is reported at 186 F. Supp. 441.

[1] References to the record in *Hill* v. *United States*, No. 68, are prefixed "H.R.", and to petitioner's brief, "H. Pet. Br." References to the record in *Machibroda* v. *United States*, No. 69, are prefixed "M.R.", and to petitioner's brief, "M. Pet. Br."

The *per curiam* opinion of the court of appeals in *Machibroda* (M.R. 59) is reported at 280 F. 2d 379. The memorandum of the district court (M.R. 47–57) is reported at 184 F. Supp. 881.

JURISDICTION

The judgment of the court of appeals in *Hill* was entered on June 14, 1960 (H.R. 45), and, in *Machibroda,* on June 6, 1960 (M.R. 59). The petition for a writ of certiorari in *Hill* was filed on June 30, 1960, and in *Machibroda,* on July 22, 1960, and both petitions were granted on March 20, 1961 (H.R. 46, 365 U.S. 841; M.R. 60, 365 U.S. 842). The grant in *Hill* was limited to question 1 stated below. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In both the *Hill* and the *Machibroda* cases: Whether the petitioner may seek relief in a collateral proceeding on the ground that the trial court, in violation of Rule 32(a), F.R. Crim. P., failed to inquire whether he had anything to say in his own behalf or had any information to present in mitigation of punishment before the imposition of sentence.

2. In the *Machibroda* case: Whether the trial court, on the basis of the files and records, properly denied without a hearing petitioner's contention that his plea of guilty had been involuntarily made and accepted in violation of Rule 11, F.R. Crim. P.

STATUTE AND RULES INVOLVED

Section 2255 of Title 28, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 35 of the Federal Rules of Criminal Procedure provides:

Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the

court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 11 of the Federal Rules of Criminal Procedure provides:

Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

[redacted]

Hill v. *United States*, *No. 68*

1. On November 10, 1952, petitioner was indicted in the United States District Court for the Eastern District of Tennessee under separate indictments charging transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312, and of a kidnapped person, in violation of 18 U.S.C. 1201. The district court refused to accept petitioner's plea of guilty, appointed counsel for him, and ordered a mental examination. After a hearing in open court, the court, on November 17, 1952, found petitioner to be mentally incompetent to stand trial and committed him to the custody of the Attorney General until such time as he should be competent to

stand trial. (H.R. 1, 9.) This finding was affirmed on appeal. Petitioner was confined to the United States Medical Center in Springfield, Missouri, but was later released to state authorities in Massachusetts where he was confined at the Bridgewater State Hospital. Following a habeas corpus proceeding, petitioner was adjudged sane on April 27, 1954, and the United States District Court for the District of Massachusetts entered an order directing his release unless removal proceedings were begun within one week thereafter. See *Hill* v. *United States*, 223 F. 2d 698, 700 (C.A. 6), certiorari denied, 350 U.S. 867.

Petitioner was thereupon returned to Tennessee for trial. The court appointed counsel for him. On May 6, 1954, petitioner entered a plea of not guilty by reason of insanity at the time of the commission of the alleged offenses. On June 2, 1954, the United States Attorney moved for a judicial determination of petitioner's competency. Following a hearing, the court ruled that petitioner was mentally competent to stand trial. (H.R. 2, 10.) On June 4, 1954, the jury returned a verdict of guilty on both counts (H.R. 3, 11). On the same day, petitioner was sentenced to imprisonment for twenty years for the transportation of the kidnapped person and to three years for the transportation of the stolen vehicle, the latter sentence to run consecutively to the former (H.R. 3, 11). No appeal was taken.

2. When the case was called for judgment on June 4, 1954, the court asked if the government cared to say anything. Government counsel replied that the government did not care to make a statement—

that the facts as to the defendant's character and criminal record had been developed by the proof at trial. The court inquired and received assurance that a codefendant had been sentenced to imprisonment for seventeen years. (H.R. 18.)

The court then observed that petitioner had been a puzzle to it for a long time and that it had studied and was familiar with petitioner's case and background. The court noted the adjudication on appeal of petitioner's incompetency and the many subsequent psychopathic examinations, and concluded, from all the psychiatric examinations, the lay testimony and its observations over several years, that petitioner was mentally and emotionally disturbed. Nevertheless, the court added that it believed petitioner knew what he was doing when he engaged in anti-social behavior and that the jury's verdict had been proper in every respect. (H.R. 19.)

Turning to the question of punishment, the court observed that the crime of kidnapping was a serious one and that therefore the punishment should be substantial (H.R. 19). Since, however, petitioner had already been incarcerated nineteen months in institutions at Springfield and in Massachusetts, the court decided that it would subtract two years from the twenty-five year sentence it originally had intended to impose. It then pronounced sentence as follows (H.R. 20):

> In the kidnapping case, twenty years sentence.
> In the Dyer Act case, three years.
> The kidnapping case to run first and the Dyer Act case to run consecutive with the kidnapping case.

That terminates it so far as the present is concerned. Remand Mr. Hill to the marshal.

3. The present proceeding arises from the denial of petitioner's fourth motion, pursuant to 28 U.S.C. 2255, collaterally attacking his conviction.[2]

In the present motion, petitioner asserted numerous errors, including the denial of the right to make a statement in his own behalf before sentencing, in violation of Rule 32(a), F.R. Crim. P. (H.R. 26–31)—an issue previously raised in the third proceeding (see 268 F. 2d 203, certiorari denied, 361 U.S. 854). The district court found, on the basis of the files and records, that petitioner was not entitled to relief, and noted that most of the questions raised had been passed upon previously and had been found lacking in merit (H.R. 41–43, 186 F. Supp. 441). The court of appeals, after oral argument, affirmed on the basis of the district court's opinion (H.R. 45, 282 F. 2d 352). This Court granted a petition for a writ of certiorari limited to "the question of whether petitioner may raise his claim under Federal Criminal Rule 32(a) in the proceeding which he has now brought" (H.R. 46, 365 U.S. 841).[3]

[2] Prior proceedings are reported at 223 F. 2d 699, certiorari denied, 350 U.S. 867; 238 F. 2d 84, certiorari denied, 352 U.S. 1007; 256 F. 2d 957, 268 F. 2d 203, certiorari denied, 361 U.S. 854.

[3] Since the granting of this petition for a writ of certiorari, petitioner filed yet another petition with this Court (No. 295 Misc., this Term) in which he asked for certiorari to review the affirmance of the order of denial without a hearing of a motion purportedly made under Rule 36, F.R. Crim. P.—a motion alleging, *inter alia*, that petitioner had not been afforded the right, under Rule 32(a), to speak before sentencing. The petition was denied on October 9, 1961.

1. In 1956, in the United States District Court for the Northern District of Ohio, two informations in two counts each were filed, charging petitioner with having robbed two different banks at Waterville and Forest, Ohio, respectively. Count One of each information charged petitioner with having entered a federally insured bank with intent to commit larceny, and Count Two charged him with having jeopardized the lives of bank employees by the use of dangerous weapons, in violation of 18 U.S.C. 2113 (a) and (d), respectively. (M.R. 8.)

In January 1956, petitioner, a Canadian citizen, appeared before a Canadian court with counsel, waived his rights to formal extradition, and consented to return to Toledo, Ohio, to answer the bank robbery charges.

In his first appearance on February 17, 1956, before Judge Kloeb of the federal district court in Ohio, petitioner was represented by two counsel of his own choice (M.R. 35–38). Government counsel read the first of the informations proposed to be filed, copies of which had previously been furnished defense counsel (M.R. 35–36). Government counsel asked, "Do you understand that these counts in the information charge you with serious felonies?", and then explained the right of indictment by grand jury and the right of waiver of indictment. In answer to specific inquiry, petitioner indicated that it was his desire to sign the waiver of indictment. (M.R. 36.) Petitioner's counsel assured the court that he had examined the charges carefully and had consulted his client about

them. Counsel indicated that he would like to defer entering a plea in order to talk with government counsel about the possibility of another information being filed against petitioner. (M.R. 37.)

On February 24, 1956, petitioner, represented by experienced counsel, again appeared before Judge Kloeb (M.R. 39–41). At this time, the second information was read, and the right to indictment or waiver was again explained by government counsel. Again, petitioner signed, and assured the court that he desired to sign the waiver of indictment. The informations were filed and petitioner, through counsel, entered a plea of guilty to each. With respect to both informations petitioner personally answered, "Yes, Your Honor," when asked by the court if he desired to plead guilty. (M.R. 40.) Thereafter, the court indicated that it would like to have a presentence report and continued the case for that purpose (M.R. 40–41).

On May 1, 1956, petitioner, with his counsel present, appeared before Judge Kloeb again—this time to testify in defense of a co-defendant, Marvin Breaton, charged jointly with him and found by a jury to have been guilty of the commission of the Waterville bank robbery.* Petitioner testified that he had robbed the Waterville bank but denied that Breaton had been with him. (M.R. 48–49.)

On May 23, 1956, when petitioner, with counsel, appeared before Judge Kloeb for sentencing, the following transpired (M.R. 42–43):

*Petitioner's testimony at the trial of his co-defendant is not a part of the record. Since the printing of the record, the government has had this testimony transcribed and it is available if the Court should desire to examine it.

> The Court: Does counsel for the defendant have anything to say in this matter?
> Mr. Schuchmann [defense counsel]: No. Your Honor, I believe this is my fourth appearance here with the defendant.
> The Court: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas. * * *

The court then told petitioner that the reports indicated his participation in some four robberies yielding $169,432.54. It observed that this was "quite a business" for a twenty-six year old man to be in, that it did not think he would ever correct himself, and that he ought to be confined until he was fifty or sixty years old by which time perhaps he would be able to live with the society which now needed protection from him. The court told petitioner that the intimidation of helpless women and elderly men with the use of guns was not bravery but cowardice.

Petitioner was then sentenced, on the first information, to terms of imprisonment of twenty-five years on Count Two, and to twenty years on Count One, to be served concurrently (M.R. 5–6); and, on the second information, to fifteen years imprisonment on each of Counts One and Two to be served concurrently with each other but consecutively to the term of imprisonment imposed on the first information (M.R. 11–12).

2. On November 30, 1956, some six months after sentence, petitioner, then in Leavenworth, wrote Judge Kloeb (M.R. 55–56) asking the court to make his sentences concurrent. In the letter, petitioner

noted that, at the time of sentencing, because of his obduracy and pride, he had appeared to the court as "a young maniac with no apparent respect for authority * * *." As a result, he acknowledged, the court had sent him "away for good because there seem[ed] no chance that he could ever be a law-abiding person." Petitioner finally expressed extreme remorse and his "great desire" to be accepted by the society which he said he had flouted. The letter was referred to the probation officer who wrote petitioner that the matter was now outside the jurisdiction of the court and "strictly in the hands of the Federal Parole Board." (M.R. 57.)

3. On February 9, 1959, approximately three years after sentencing, petitioner filed a motion to vacate sentence with an attached affidavit, pursuant to 28 U.S.C. 2255, in which he alleged that the sentencing court had not afforded him the opportunity to make a statement in his own behalf, in compliance with Rule 32(a), F. R. Crim. P., and that his waiver of his right to be tried by indictment for the second robbery, and his pleas of guilty to both informations, were entered as a result of an interview in the county jail in Toledo on February 21, 1956, with Clarence M. Condon, Assistant United States Attorney (M.R. 13–23). Mr. Condon allegedly represented himself as having authority to speak for the United States Attorney and the district court, and cautioned petitioner not to advise his attorney of the interview. According to petitioner, Mr. Condon promised that, if petitioner would execute the waiver and plead guilty, the court would not impose a sentence in excess of twenty years

in the first case and ten years in the second case, and that the two sentences would run concurrently.

Petitioner also asserted that Mr. Condon visited him again in the jail on May 22, 1956, at which time he mentioned that the court was vexed because of petitioner's testimony at the trial of the co-defendant Breaton and that there might be some difficulty in regard to their previous agreement. Petitioner then related that he became agitated and threatened to tell his attorney and the court of the agreement. Mr. Condon then promised that, in the event a sentence in excess of twenty years was imposed, the United States Attorney would move within sixty days for a reduction of the sentence; that petitioner had nothing to worry about if he kept quiet; but that, if he insisted on making a scene, certain unsettled matters concerning two other robberies would be added to his present difficulties.

Petitioner further maintained that, immediately after sentencing, Mr. Condon assured him that he would have the sentence reduced to twenty years as soon as the judge "cooled off." Finally, petitioner claimed that he had written two letters to the sentencing court and two letters to the Attorney General informing them of the misrepresentations by Mr. Condon.

The government filed a memorandum in opposition to the motion to vacate (M.R. 24–32), attaching an affidavit of Clarence M. Condon, which emphatically denied that Condon had ever discussed a plea with petitioner, or coerced or promised him anything (M.R. 33–34). According to the affidavit, the only

time Condon had ever mentioned a sentence to petitioner, or had in fact ever seen petitioner outside of the courtroom, was on the afternoon before Breaton's trial, at which time Condon reminded petitioner that he was being given the last opportunity to tell the truth and that the court, in sentencing, might well take into consideration petitioner's refusal to talk.

The court denied the motion without a hearing, finding on the basis of the files and records that the circumstances at sentencing were such as to entitle petitioner to no relief upon his allegation that the court had not complied with Rule 32(a). Moreover, in a comprehensive memorandum, Judge Kloeb, reviewing all the files and records, including the transcripts of petitioner's appearances before him, found petitioner's story of an agreement made with the Assistant United States Attorney to be false. (M.R. 47–55, 184 F. Supp. 881.) The court noted that it had never received either of the two letters which petitioner swore he had addressed to the court apprising it of the alleged agreement (M.R. 49), and quoted verbatim the letter which it had received from petitioner six months after sentencing (M.R. 50–52), which made no mention of any agreement but rather requested an adjustment in sentence downward to twenty-five, not twenty, years (M.R. 53). The court finally noted petitioner's long silence and reasoned that, had government counsel promised to move for reduction of sentence from forty to twenty years within sixty days after sentence, a failure so to move "would have brought forth a cry of anger and anguish" from petitioner (M.R. 50). The court did not

specifically rely on Mr. Condon's affidavit. The court of appeals affirmed (M.R. 59, 280 F. 2d 379), and this Court granted certiorari (M.R. 60, 365 U.S. 842).

SUMMARY OF ARGUMENT

I

The failure of the sentencing courts in these two cases to observe the formal requirements of Rule 32(a), F.R. Crim. P., with respect to the petitioners' rights of allocution, is an issue cognizable only upon direct appeal; the errors are not correctible by any postconviction remedy, be it habeas corpus or a motion under 28 U.S.C. 2255 or Rule 35, F.R. Crim. P.

A. The writ of habeas corpus has been sparingly issued with respect to matters occurring during the course of trial, and is available, if at all, only with respect to errors of a fundamental jurisdictional or constitutional character. Noncompliance *per se* with a procedural rule in sentencing has had no place among the extraordinary abuses which have necessitated the invocation of the writ of habeas corpus.

The remedy afforded by 28 U.S.C. 2255 is the substantive equivalent of the writ of habeas corpus. The "sole purpose" of its enactment "was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum," *i.e.*, the place of sentencing rather than the place of confinement. *United States* v. *Hayman*, 342 U.S. 205, 219. The legislative history of Section 2255 makes it clear that the remedy which it was to afford was to be broader in scope than the limitations of *coram nobis* at common law, and as broad as,

but no broader than, the remedy afforded by habeas corpus. Thus, the lower courts have consistently held that a collateral attack under Section 2255 may be sustained only upon grounds which would warrant the granting of a writ of habeas corpus.

The violation of the right of allocution guaranteed under Rule 32(a) is no more than a violation of a rule of practice, which, because it does not in and of itself involve constitutional rights or jurisdictional defects, may not be urged as a basis for collateral attack by an application for a writ of habeas corpus or a motion under 28 U.S.C. 2255. Although noncompliance with some Rules of Criminal Procedure may render a judgment subject to collateral attack, that is not because the particular rules themselves are violated, but because the rules embody or restate certain fundamental constitutional safeguards, a violation of which may deprive the defendant of guarantees of due process or which may undermine the jurisdiction of the court. A violation of Rule 43, requiring the presence of a defendant at every stage of the trial, or Rule 44, requiring the court to advise the defendant of his right to counsel, is an example of the type of noncompliance which may render a judgment subject to collateral attack. Similarly, a violation of Rule 11, which prohibits the court from accepting a plea of guilty without first determining that the plea is voluntarily and intelligently made, is subject to collateral review, not to determine whether the court followed the exact formula or ritual prescribed by the rule, but rather to determine the constitutional dimension of the violation.

On the other hand, noncompliance with other rules, which embody only sound practice, may not serve as a basis for collateral attack. Thus where an accused is aware of the substance of the charge against him, the courts have not considered a technical violation of Rule 10, which protects the right of an accused to be arraigned in open court and to be informed of the nature and cause of the accusation against him, as a jurisdictional defect subject to attack under 28 U.S.C. 2255. Similarly, since the failure of the courts in the present cases to accord petitioners their right of allocution under Rule 32(a) is not the type of flagrant error or omission which would result in a void judgment or a complete miscarriage of justice, the violation should not serve as the occasion to extend the motion to vacate under 28 U.S.C. 2255 beyond its historical bounds.

B. Rule 35, F.R. Crim. P., provides a remedy even more narrow in scope than either habeas corpus or 28 U.S.C. 2255. It is available only to correct an illegal sentence. An "illegal" sentence is confined to the narrow class of sentences which, on the face of the record, do not comply with the criminal statutes which authorize them. Since, historically, the record by which a sentence has been determined to be illegal was considered to be only the common law judgment roll, which included mainly the indictment, the plea, the verdict and the sentence, the common law record would not serve as a basis of determining whether a court had accorded an accused the right of allocution. Since Rule 35 was intended to continue existing law, it cannot serve as a remedy for a violation of Rule 32(a).

To say that a sentence was illegal because of some error of commission or omission of the trial judge at any stage of the proceeding would be totally incompatible with the whole historical development of the remedy for setting aside an illegal sentence, culminating in Rule 35.

II

On the face of the record in *Machibroda* case, petitioner's bare allegations that he was induced to enter a plea of guilty by the promise of leniency of the Assistant United States Attorney entitles him neither to a hearing nor to relief. Sufficient averments of fact set forth in a motion under 28 U.S.C. 2255 must be accepted as true only insofar as they are not inconsistent with the record, for Section 2255 permits summary dismissal if "the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief."

The district court specifically found that the motion, files and records refuted petitioner's assertions. The record supports this finding and leaves no room for doubt that petitioner's plea was made deliberately and with understanding. The court's conclusion is reinforced by certain recitations in petitioner's motion which the court of its own personal knowledge concluded were untrue. The judge had never received the two letters allegedly sent by petitioner apprising the court of the prosecutor's promise. Moreover, the letter the judge did receive, six months after sentencing, made no mention of the prosecutor's alleged promise of leniency.

The grounds and allegations in petitioner's motion are tailor-made to meet his lack of supporting data and inconsistency of conduct. Every averment is so stated that there is no possibility of outside corroboration, as for instance that his "conversations" with the prosecutor were known to no third party. To require a hearing under these circumstances, simply because the allegations were made, would mean that the number of hearings or motions under Section 2255 would be limited only by the imagination and ingenuity of the prisoners involved. Neither Section 2255 nor *United States* v. *Hayman, supra,* imposes such a requirement.

Finally, the procedure followed by the court in ascertaining whether petitioner fully understood the charges and desired to enter the plea constituted adequate compliance with Rule 11. The whole pattern of petitioner's conduct—his act of surrender to the jurisdiction in waiving extradition, his assurances in open court as to his desires, his contrite letter to the court following sentence—showed voluntariness and volition.

ARGUMENT

I

NEITHER PETITIONER IS ENTITLED IN A COLLATERAL PROCEEDING TO RELIEF FROM SENTENCES IMPOSED IN VIOLATION OF THE RIGHT OF ALLOCUTION GUARANTEED BY RULE 32(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

In *Green* v. *United States,* 365 U.S. 301, eight members of this Court held that Rule 32(a), F. R. Crim. P. (*supra,* pp. 4–5), which provides that "[b]efore im-

posing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment," requires "that the defendant be personally afforded the opportunity to speak before imposition of sentence" (365 U.S. at 304; see *id.* at 307). Only Mr. Justice Stewart accepted the government's position that an opportunity afforded to counsel might fulfill the obligation of the Rule, even though the better practice was "to assure the defendant an express opportunity to speak for himself" (*id.* at 306). Four members of the Court,[5] however, thought the record to be too ambiguous to show that Green had not been afforded a personal opportunity to speak. On consideration of Green's motion under Rule 35, F. R. Crim. P. (*supra*, p. 4), therefore, the majority of the Court affirmed Green's conviction without specifically deciding whether the question of the violation of Rule 32(a) could be raised on collateral attack and whether the violation "would constitute an error *per se* rendering the sentence illegal" (365 U.S. at 303; see *id.* at 304–305). That question is before the Court in the present cases.[6]

Petitioners impliedly concede that the failure of the trial courts expressly to afford petitioners their right of allocution under Rule 32(a) would not have been an error cognizable by an application for a writ

[5] Mr. Justice Frankfurter, joined by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker.

[6] As to relief on direct appeal from a sentence imposed in violation of Rule 32(a), see *Van Hook* v. *United States*, 365 U.S. 609.

of habeas corpus prior to 28 U.S.C. 2255. They therefore seek relief by motions under Section 2255 (*supra*, pp. 3–4) (see M. Pet. Br. 20–28; H. Pet. Br. 22). They further argue in the alternative, citing *Heflin* v. *United States*, 358 U.S. 415, that the Court may treat their motions under 28 U.S.C. 2255 as motions seeking relief under Rule 35 (see H. Pet. Br. 12–21; M. Pet. Br. 20).[7] In contrast, the government contends that a court's failure to observe the formal requirements of Rule 32(a) is an issue cognizable only upon direct appeal, and that the error is not correctible by any post-conviction remedy, be it habeas corpus or a motion under 28 U.S.C. 2255 or Rule 35. The government concedes at the outset that neither petitioner was personally afforded the opportunity to speak before imposition of sentence as that right under Rule 32(a) was construed in *Green* v. *United States*, *supra*.

A. THE FAILURE OF THE TRIAL COURTS TO COMPLY WITH RULE 32(a) IS NOT COGNIZABLE ON HABEAS CORPUS OR UNDER 28 U.S.C. 2255

1. *The scope of the writ of habeas corpus.*—The scope of the writ of habeas corpus in modern times cannot easily be compressed into a rigid rule or a set formula; nevertheless, as to matters occurring during the course of trial, which can be corrected on direct appeal, the writ is sparingly issued and is available,

[7] In *Hill*, the Court granted certiorari limited to the question whether petitioner could raise his claim of noncompliance with Rule 32(a) "in the proceeding which he has now brought" (H.R. 46, 365 U.S. 841). The government does not challenge petitioner's conclusion (H. Pet. Br. 12) that this language may be construed to mean a proceeding seeking relief under either Section 2255 or Rule 35.

if at all, only with respect to errors of a fundamental jurisdictional or constitutional character. See *Sunal* v. *Large*, 332 U.S. 174; *Bowen* v. *Johnston*, 306 U.S. 19. See also the brief for the United States in *Hodges* v. *United States*, No. 58, this Term, at pp. 35–36, 48, 52–56. In *Sunal* v. *Large*, an incorrect trial ruling that a defendant could not offer a defense which, under subsequent decisions, should have been available to him was deemed correctible only by direct appeal, and not on collateral attack, for, as the majority held, the writ will not substitute for an appeal other than in "exceptional circumstances" (332 U.S. at 184). Even the dissenting Justices agreed that trial errors ordinarily would not fall within the scope of the writ, since the writ was available whenever necessary "'to prevent a complete miscarriage of justice'" (*id.* at 187, 188). Thus, with respect to legality of sentence or matters of confinement, the writ has been held to be properly invoked only when the court inherently lacked jurisdiction as when its power to sentence was at an end (see *Ex parte Lange*, 18 Wall. 163), when it exceeded its power to sentence (see *In re Bonner*, 151 U.S. 242), or when its sentence exceeded the maximum provided by statute. But a misrecital in a verdict has been held to be no more than an irregularity not affecting jurisdiction. *Ex parte Wilson*, 114 U.S. 417, 421. On its face, therefore, noncompliance *per se* with a procedural rule in sentencing has no place among the extraordinary abuses which have necessitated the invocation of the writ of habeas corpus.

2. *The remedy afforded by 28 U.S.C. 2255 is the substantive equivalent of the writ of habeas corpus.*—

Section 2255 (*supra*, pp. 3–4) permits a prisoner in federal custody to "move the court which imposed the sentence to vacate, set aside or correct the sentence" upon a claim that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack * * *." If the sentencing court, after following prescribed procedures, finds "that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack * * *," the court must grant appropriate relief.

Section 2255 was enacted in 1948 as a part of Chapter 153 (Habeas Corpus) of the revision of the Judicial Code, upon the recommendation of the Judicial Conference of the United States. The section incorporates the language of bills prepared by the Judicial Conference Committee on Habeas Corpus Procedure. The history of Section 2255, as detailed in *United States* v. *Hayman*, 342 U.S. 205, 214–219, indicates that the statutory remedy was prompted by the concern of the Judicial Conference about the large volume of frivolous and repetitive applications for habeas corpus. Since these applications were required to be filed in the districts of confinement, rather than the districts where the sentences had been imposed, they continually caused burdensome administrative

problems involving the production of records and witnesses. See also Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171. According to the Court in *Hayman* (342 U.S. at 219): "[T]he sole purpose of [Section 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."

In order to buttress their argument that Section 2255 was intended to provide a broader scope of review than habeas corpus, petitioners mistakenly rely upon language in the section that relief may be claimed upon the ground that the sentence "is otherwise subject to collateral attack" (M. Pet. Br. 21; see H. Pet. Br. 22). But this clause in Section 2255 was only to make it clear that the statutory remedy was as broad as, but no broader than, habeas corpus.

Although habeas corpus was the normal method of collateral attack on judgments of conviction in the federal courts prior to Section 2255, a number of prisoners had attempted to gain post-conviction and post-appeal review of their convictions by a motion in the sentencing court in the nature of a common law writ of error *coram nobis*. Whether the remedy existed and whether its scope was as broad as habeas corpus were unsettled questions.[8] Insofar as the new remedy, embodied in Section 2255, covered post-conviction remedies of a prisoner in custody,[9] how-

[8] See, *e.g.*, *Kelly* v. *United States*, 138 F. 2d 489 (C.A. 9), certiorari denied, 324 U.S. 855; *United States* v. *Steese*, 144 F. 2d 439 (C.A. 3); *Crowe* v. *United States*, 169 F. 2d 1022 (C.A. 4).

[9] See *United States* v. *Morgan*, 346 U.S. 502; *Heflin* v. *United States*, 358 U.S. 415.

ever, it was specifically intended to be broader in scope than the limitations of *coram nobis* at common law. In a statement prepared at the request of the Chairman of the House and Senate Judiciary Committees, the Habeas Corpus Procedure Committee of the Judicial Conference explained:[10]

> This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader, than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is "open to collateral attack." *As a remedy, it is intended to be as broad as habeas corpus.* [Emphasis added.]

The lower courts have consistently held that a collateral attack under Section 2255 may be sustained only upon grounds which would warrant the granting of a writ of habeas corpus.[11] As in habeas

[10] Quoted in *United States* v. *Hayman*, *supra*, 342 U.S. at 216–217. The pertinent portions of this statement were incorporated in the Judiciary Committee's favorable report on S. 20, S. Rep. No. 1526, 80th Cong., 2d Sess., pp. 2–3.

[11] See, *e.g.*, *Larson* v. *United States*, 275 F. 2d 673 (C.A. 5), certiorari denied, 363 U.S. 849; *United States* v. *Kelly*, 269 F. 2d 448 (C.A. 10), certiorari denied, 362 U.S. 904; *Black* v. *United States*, 269 F. 2d 38, 41 (C.A. 9), certiorari denied, 361 U.S. 938; *Kreuter* v. *United States*, 201 F. 2d 33, 35 (C.A. 10); *Birtch* v. *United States*, 173 F. 2d 316, 317 (C.A. 4) (opinion joined by Judge Parker, the author of the legislation); *Taylor* v. *United States*, 229 F. 2d 826 (C.A. 8), certiorari denied, 351 U.S. 986 (opinion by Judge Stone, also of the Judicial Conference Committee); *United States* v. *Edwards*, 152 F. Supp. 179 (D.D.C.), affirmed, 256 F. 2d 707 (C.A.D.C.), certiorari denied, 358 U.S. 847. See also 4 Barron (and Holtzoff), *Federal Prac-*

corpus, a motion under the statute is not a substitute for appeal.[11] Failure to appeal and evidence of conscious election not to appeal may in fact bar resort to Section 2255.[12] Moreover, even in those funda-

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tice and Procedure (Rules ed.), Sec. 2306; Note, 59 Yale L.J. 786, 789.

The cases which petitioners cite (M. Pet. Br. 23) do not stand for the proposition that Section 2255 provides a broader remedy than was available under habeas corpus. None of the decisions says this; the factual situations do not imply this. Thus, the circumstances in *Poole* v. *United States*, 250 F. 2d 396 (C.A.D.C.), showed a totality of serious errors including the acceptance of a plea of guilty made without benefit of counsel and improper and misleading judicial directives regarding a subsequent request for withdrawal; *Pugh* v. *United States*, 212 F. 2d 761 (C.A. 9), involved a conviction obtained without indictment in the district court in Guam, which the court compared to a conviction based upon an indictment stating an offense not punishable by federal statute; *United States* v. *Russo*, 260 F. 2d 849 (C.A. 2), stands for the proposition that matters regarding the extent of a bill of particulars are reviewable on appeal; *Brooks* v. *United States*, 223 F. 2d 393 (C.A. 10), involved an appeal from the denial of a writ of error *coram nobis* where a sentence on one count was void and on another equivocal. All of these issues would presumably have been cognizable under habeas corpus.

[11] See *Killibrew* v. *United States*, 275 F. 2d 308 (C.A. 5); *Edwards* v. *United States*, 256 F. 2d 707 (C.A.D.C.), certiorari denied, 358 U.S. 847; *Clark* v. *United States*, 273 F. 2d 68 (C.A. 6), certiorari denied, 362 U.S. 979; *Banks* v. *United States*, 258 F. 2d 318 (C.A. 9), certiorari denied, 358 U.S. 886; *United States* v. *Rosenberg*, 200 F. 2d 666 (C.A. 2), certiorari denied, 345 U.S. 965.

The question whether the admission into evidence of a coerced confession is properly the subject of a collateral attack is now pending in this Court. *Hodges* v. *United States*, No. 58, this Term.

[12] See *Larson* v. *United States*, 275 F. 2d 673 (C.A. 5), certiorari denied, 363 U.S. 849; *Kyle* v. *United States*, 266 F. 2d 670 (C.A. 2), certiorari denied, 361 U.S. 870.

mental areas where relief under a post-conviction remedy is available, the burden is on the prisoner to show that the facts merit the extraordinary relief. Thus, with respect to the allegation of ineffective assistance of counsel, mere improvident strategy, bad tactics, a mistake, carelessness, or inexperience do not necessarily warrant relief unless the trial, taken as a whole, was considered a "mockery of justice." [14]

3. *A violation of the right of allocution is not cognizable under Section 2255.*—The failure of a trial court to ask a defendant whether he has anything to say before sentence is not an error with the scope, character, or magnitude of the errors cognizable on collateral attack by habeas corpus or by a motion under 28 U.S.C. 2255.

(*a*). The error in the courts below was one known and capable of being raised on appeal; no question of the jurisdiction or the competency of the courts is raised; and the sentence was within the power of the court to impose and within the maximum permitted by the statute (see *supra*, pp. 21–22).

Moreover, in the present cases, there is no question of a violation of a specific constitutional guaranty. The right embodied in Rule 32(a), and affirmed in *Green* v. *United States, supra,* had its genesis in the English common law practice of allocution—a prac-

[14] See *Edwards* v. *United States*, 256 F. 2d 707, 708 (C.A. D.C.), certiorari denied, 358 U.S. 847; *Mitchell* v. *United States*, 259 F. 2d 787 (C.A.D.C.), certiorari denied, 358 U.S. 850. As to the burden of showing knowing use of perjured testimony, see *Black* v. *United States*, 269 F. 2d 38, certiorari denied, 361 U.S. 938; *Taylor* v. *United States*, 299 F. 2d 826 (C.A. 8), certiorari denied, 351 U.S. 986.

tice necessary at a time when a person convicted of a felony was not permitted to have counsel to defend him. Up until the time of the *Green* decision, the federal courts had not generally held the practice of allocution to be subject to strict literal enforcement, except with respect to capital cases. See *Ball* v. *United States,* 140 U.S. 118; *United States* v. *Austin-Bagley Corp.,* 31 F. 2d 229 (C.A. 2); *Sandroff* v. *United States,* 174 F. 2d 1014 (C.A. 6), certiorari denied, 338 U.S. 947. The failure to follow this practice, where the defendant had counsel to speak for him, was clearly not action or inaction "inconsistent with the rudimentary demands of justice".[15] In view of the safeguards protecting an accused person under present day judicial procedure—the right to representation by counsel, the opportunities afforded to move for a new trial or in arrest of judgment and to file exceptions, and the right of appeal—it is difficult to imagine how the courts' failure to direct the traditional inquiry could result *per se* in the deprivation of a fair opportunity to present facts and argument relevant to the sentence, which would be the limit of the substantive constitutional right.[16] Certainly the error alleged in the present cases does not begin to approach in potential effect the seriousness of the trial error in *Sunal* v. *Large, supra,* which was held not to be remediable on collateral attack (see *supra,* p. 22). The violation of the right of allocution is no more than breach of a rule of practice.

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[15] *Mooney* v. *Holohan,* 294 U.S. 103, 112.

[16] See *Garland* v. *Washington,* 232 U.S. 642, 645–646.

(*b*). Failure to comply with every Rule of Criminal Procedure is not in itself so basic an error as to require vacation of sentence. To be sure, there are some rules, such as Rule 43, requiring the presence of a defendant at every stage of the trial, or Rule 44, requiring the court to advise the defendant of his right to counsel,[17] which restate fundamental constitutional rights; noncompliance with these rules may render a judgment subject to collateral attack because it undermines the basic jurisdiction of the court.

Similarly a violation of Rule 11 (*supra*, p. 5), which prohibits the court from accepting a plea of guilty without first determining that the plea is made voluntarily and with understanding of the nature of the charge, is subject to review on collateral attack. The review is not accorded, however, merely for a literal violation; the Rule does not require a court to follow any particular ritual or any special form of words (see *infra*, p. 42). Rather, review is granted only to determine whether the accused has been deprived of his liberty without due process of law.

But noncompliance with other Rules, which embody procedural safeguards, may not serve as a basis for vacation of a judgment. Thus, Rule 10 protects the right of an accused to be arraigned in open court and to be informed of the nature and cause of the accusation against him. The rule is based, not only

[17] Significantly, both of these rules recognize conditions under which the rights which they protect may be waived. With respect to Rule 43, see *Lewis* v. *United States*, 146 U.S. 370; *Diaz* v. *United States*, 223 U.S. 442; *Snyder* v. *Massachusetts*, 291 U.S. 97; *Price* v. *Johnston*, 334 U.S. 266. With respect to Rule 44, see *Johnson* v. *Zerbst*, 304 U.S. 458.

upon common law practice, but upon the express language of the Sixth Amendment." Yet the courts, relying on this Court's holding in *Garland* v. *Washington*, 232 U.S. 642, that, where the accused is aware of the substance of the charge against him, the technical right to formal arraignment and plea is not an essential element of due process, have held that failure to follow the procedure prescribed by Rule 10 is not a jurisdictional defect. In *Ray* v. *United States*, 192 F. 2d 658, 659, the Fifth Circuit, faced with the contention that an accused was not furnished a copy of an indictment, held that "the omission * * *, even if error remediable on direct appeal, does not render the judgment subject to collateral attack under 28 U.S.C.A. 2255." In *Merritt* v. *Hunter*, 170 F. 2d 739 (C.A. 10), the accused contended that the failure of the court to call upon him to plead out of his own mouth deprived the court of jurisdiction. The court replied (*id.*, at 741):

> Obviously, arraignment in accordance with Rule 10 is intended to be a safeguard for due process—a pattern for a fair hearing. It is only when failure to observe this safeguard amounts to denial of due process that the court is deprived of jurisdiction. The fair administration of justice does not depend upon such procedural niceties.

Accord, *United States* v. *Denniston*, 89 F. 2d 696 (C.A. 2), certiorari denied, 301 U.S. 709; *Mayes* v. *United States*, 177 F. 2d 505 (C.A. 8).

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[11] See *Simons* v. *United States*, 119 F. 2d 539 (C.A. 9), certiorari denied, 314 U.S. 616.

(*c*). With respect to Rule 32(a), what clear judicial authority there was prior to the Court's decision in the *Green* case, *supra,* was to the effect that the claim of non-compliance with Rule 32(a) is a matter not subject to review in a collateral proceeding. See *Parker v. United States,* 248 F. 2d 803 (CA. 4), certiorari denied, 355 U.S. 963; *Mixon* v. *United States,* 214 F. 2d 364 (C.A. 5). The decisions cited by petitioner (M. Pet. Br. 24–25) are of little help.[19] For the most part, the courts found it unnecessary to consider the issue raised in the present cases because they considered the substantive claim of non-compliance with Rule 32(a) so plainly without merit.[20] In some of the decisions, there is even the suggestion that the issue is not one to be raised long after conviction.[21] Although certain courts, purporting to rely on the *Green* case, have assumed that a violation of the right

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[19] But see *Couch* v. *United States,* 235 F. 2d 519 (C.A.D.C.), in which the court, in affirming the denial of a motion under 28 U.S.C. 2255 raising the issue of allocution under Rule 32(a), adopted the practice of allocution as a new procedure to operate prospectively only. In a concurring opinion in *Couch,* four judges suggested that failure to follow the procedure under Rule 32(a) would be "in some circumstances at least as to trials and convictions occurring after the rendition of today's opinion" a matter requiring resentencing when urged under Section 2255 (235 F. 2d at 521). In *Jenkins* v. *United States,* 249 F. 2d 105 (C.A.D.C.), the court followed this procedure with respect to sentences coming after the *Couch* decision.

[20] See *United States* v. *Galgano,* 281 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 883; *United States* v. *Miller,* 158 F. Supp. 261 (S.D.N.Y.); *United States* v. *Sousa,* 158 F. Supp. 508 (S.D.N.Y.).

[21] See *id.* at 510; *United States* v. *Carminati,* 25 F.R.D. 31 (S.D.N.Y.), affirmed *sub nom. United States* v. *Galgano, supra.*

of allocution is cognizable in a proceeding under Section 2255," this Court in *Green* did not so hold. Indeed, subsequent to the decision in the *Green* case, the Court granted certiorari in the present cases to decide that very issue.

The government does not question the importance of "the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." Nor does it disagree that a defendant might be more persuasive than counsel were he to speak for himself. *Green* v. *United States, supra,* 365 U.S. at 304. Moreover, the government does not question the right of a defendant, on direct appeal, to have a judgment against him reversed and the cause remanded for resentencing if he had not been granted the personal right of allocution in accordance with the literal terms of Rule 32(a). See *Van Hook* v. *United States,* 365 U.S. 609. What the government does question is the right of a defendant to invoke a literal violation of Rule 32(a) as the occasion to extend 28 U.S.C. 2255 beyond its historical bounds in order to permit resentencing, possibly years after conviction. Clearly, the mere failure of the courts in the present cases to accord petitioners the right personally to speak in their own behalf or to present information in mitigation of punishment is not the type of flagrant error or omission which would result in a void judgment, a "complete miscarriage of justice," or a fundamental defect, especially where both petitioners were repre-

[11] See *Jenkins* v. *United States,* No. 18783, C.A. 5, decided Aug. 16, 1961; *Domenica* v. *United States,* 292 F. 2d 483 (C.A. 1); *United States* v. *Donovan,* Cr. No. 145-191, S.D.N.Y.

sented by experienced counsel, both courts were thoroughly familiar with petitioners' past history and background, and, at least in the *Machibroda* case, the counsel had been asked by the court whether he had anything to say.

B. THE FAILURE OF THE TRIAL COURTS TO COMPLY WITH RULE 32(a) DOES NOT RESULT IN AN ILLEGAL SENTENCE SUBJECT TO CORRECTION UNDER RULE 35.

1. *The general scope of Rule 35.*—Rule 35, F.R. Crim. P., provides a remedy even more narrow in scope than either habeas corpus or 28 U.S.C. 2255. It is available only to correct an *illegal* sentence. See *Heflin* v. *United States,* 358 U.S. 415; *Cuckovich* v. *United States,* 170 F. 2d 89 (C.A. 6), certiorari denied, 336 U.S. 905; *Funkhouser* v. *United States,* 260 F. 2d 86 (C.A. 4), certiorari denied, 358 U.S. 940. The government contends that the failure of the trial courts to comply with Rule 32(a) does not result in an *illegal* sentence within the meaning of Rule 35.

Sentences subject to correction under Rule 35 include those which the judgment of conviction did not authorize,[23] and others in which there is need for bringing an improper sentence into conformity with the law,[24] such as sentences which do not comply with the criminal statutes which authorized them.[25] Thus,

[23] See *United States* v. *Morgan,* 346 U.S. 502; *United States* v. *Bradford,* 194 F. 2d 197 (C.A. 2).

[24] See *Cook* v. *United States,* 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Duggins* v. *United States,* 240 F. 2d 479 (C.A. 6); *Fooshee* v. *United States,* 203 F. 2d 247 (C.A. 5).

[25] See *Bozza* v. *United States,* 330 U.S. 160, 166.

Rule 35 has been applied to provide relief in those situations where the sentence, as disclosed by the record, was in excess of the statutory provision or in some way contrary to the applicable statute.[26] The Rule has not been applied in many other situations said to involve a trial error, even where the invalidity of the sentence is urged to have arisen as a result of facts existing as the time of the pronouncement of sentence.[27]

2. *The history of Rule 35.*—The history of Rule 35 supports the government's contention that the correction it contemplates is that of adjusting a sentence, which is imperfect on the face of the record, to conform to a valid statute.

Prior to the adoption of the Rules, the common law significance of the expiration of a term of court presented many problems.[28] At common law, a court was without power to vacate or alter a sentence unless a proceeding for that purpose was begun during the term. See *United States* v. *Mayer,* 235 U.S. 55;

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[26] See *Callanan* v. *United States*, 364 U.S. 587; *Heflin* v. *United States*, *supra; Holiday* v. *Johnston*, 313 U.S. 342. See also *McIntosh* v. *Pescor*, 175 F. 2d 95 (C.A. 6); *United States* v. *Rader*, 185 F. Supp. 224 (D.C.W.D. Ark.); 4 Barron, *Federal Practice and Procedure* (Rules ed., 1951), Sec. 2301.

[27] See *McIntosh* v. *Pescor*, *supra*, where the defendant was alleged to be insane at the time of sentencing. But see *Byrd* v. *Pescor*, 163 F. 2d 775 (C.A. 8), certiorari denied, 333 U.S. 846. The Rule has specifically been held inapplicable to challenges on grounds involving the denial of the right to counsel (*United States* v. *Morgan*, *supra*), the jurisdiction of the jury and the court (*United States* v. *Bradford*, *supra*), the technical sufficiency of indictments (*Cook* v. *United States*, *supra*), and the voluntariness of a plea of guilty (*In re Shepherd*, 195 F. 2d 157 (C.A. 1)).

[28] See *United States* v. *Benz*, 282 U.S. 304.

Lockhart v. *United States*, 136 F. 2d 122 (C.A. 6). In the *Mayer* case,[29] this Court invoked this common law background in holding that, after term, the federal district courts could not set aside or modify their final judgments for errors of law, and could modify their judgments for errors of fact, if at all, only if those errors were of a most fundamental character, such as would render the proceeding itself irregular and invalid. But the rule in the *Mayer* case was never intended to mean that the ending of the term affected the federal district court's power to vacate a sentence which was *illegal*.

A review of the cases involving illegal sentences reveals that judicial considerations of illegality were confined almost solely to situations where the punishment imposed was in excess of the maximum punishment permitted by statute or where two punishments were imposed for the same offense.[30] A court was of course always permitted to correct its records.[31] In at least one instance, the ending of the term was held not to affect the court's power to review a sentence imposed under a statute subsequently declared unconstitutional.[32] Beyond these narrow situations, the courts consistently followed *Mayer* in

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[29] The Court in *Mayer* held that error involving the bias of a juror could not be heard in a federal court by motion after the expiration of the term in which judgment was entered; the remedy, if any, was by writ of error or motion for a new trial.

[30] See, *e.g.*, *Lockhart* v. *United States*, *supra*, and cases cited therein; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9); *Bugg* v. *United States*, 140 F. 2d 848 (C.A. 8), certiorari denied, 323 U.S. 673.

[31] See *Nivens* v. *United States*, 139 F. 2d 226 (C.A. 5); compare Rule 36, F.R. Crim. P.

[32] *Waldron* v. *United States*, 146 F. 2d 145 (C.A. 6).

ruling that there is no power to vacate, after term, for such matters as the validity or sufficiency of indictment, trial by jury, representation by counsel, or the like."[23]

At the time of the adoption of the Rules, the Note of the Advisory Committee observed that the first sentence of Rule 35, providing that a court may correct an illegal sentence at any time, "continues existing law." The "existing law" as to illegal sentences stemmed from the common law. At common law, errors of law subject to examination were only those disclosed by the common law record, *i.e.*, the common law judgment roll, which included mainly the indictment, the plea, the verdict and the sentence. See *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2); *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2). As the Court explained in *United States* v. *Mayer*, *supra*, 235 U.S. at 68:

> The errors of law which were * * * subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied "only to that very small number of legal questions" which concerned "the regularity of the proceedings themselves." See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310.

Since the common law record would fail to show that a court had not complied with Rule 32(a), the court

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[23] See *Bugg* v. *United States*, *supra*, and cases cited therein, 140 F. 2d at 850.

would have to go behind that record to look for "illegality", and, in some instances, would have to make determinations of fact, if the issue of a violation of Rule 32(a) were to be permitted to be raised in a Rule 35 proceeding. But Rule 35 was never intended as a remedy for that type of error. As Mr. Justice Stewart stated in his concurring opinion in *Heflin* v. *United States, supra,* 358 U.S. at 422: "[Rule 35] * * * was intended to remove any doubt created by the decision in *United States* v. *Mayer,* 235 U.S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered." Thus, the rule did not enlarge the scope of illegality as it was understood prior to its adoption. To say that a sentence was illegal because of some error of commission or omission of the trial judge at any stage of the proceeding would be incompatible with the whole historical development of the remedy for setting aside an "illegal" sentence, culminating in Rule 35. In the present cases there was a trial error, but the sentence was not "illegal."

II

ON THE BASIS OF THE FILES AND RECORDS, THE TRIAL COURT IN THE MACHIBRODA CASE PROPERLY DENIED PETITIONER'S CONTENTION THAT HIS PLEA OF GUILTY HAD BEEN INVOLUNTARILY MADE AND ACCEPTED IN VIOLATION OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The government does not question petitioner's premise in *Machibroda,* No. 69 (M. Pet. Br. 10–16)—that a guilty plea, if induced by promises which deprive

it of the character of a voluntary act, is void, and that a conviction thereupon may be set aside upon collateral attack. See *Walker* v. *Johnston*, 312 U.S. 275; *Waley* v. *Johnston*, 316 U.S. 101. The government submits, however, that, on the face of the record in the *Machibroda* case, petitioner's bare allegation, that he was induced to enter his plea by the promise of the Assistant United States Attorney, entitles him neither to a hearing nor to relief.

Petitioner, relying upon *United States* v. *Hayman*, 342 U.S. 205, incorrectly assumes that, by the simple expedient of setting out details of conversations he allegedly had with the Assistant United States Attorney, he has raised a substantial issue of fact which entitles him to be produced for a hearing. In *Hayman*, the Court pointed out that the issue raised by the motion under 28 U.S.C. 2255, whether the defendant's attorney had appeared as counsel for a witness with the defendant's knowledge and consent, was not conclusively determined by the files and records in the trial court (342 U.S. at 219), and the government in *Hayman* conceded that the factual issues raised required the movant's presence at a hearing (*id.* at 209). The Court, however, took care to note that a prisoner does not have to be automatically produced in every proceeding, but that his production depended upon the circumstance of each case (*id.* at 222–223). Thus, the *Hayman* case recognized, as does petitioner, that Section 2255 permits summary dismissal if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." See also 28 U.S.C. 2243; *Walker* v. *Johnston, supra*, 312

U.S. at 284. Although sufficient averments of facts contained in a motion must normally be accepted as true, this is so only *"insofar as they are not inconsistent with the record." United States* v. *Sturm,* 180 F. 2d 413, 414 (C.A. 7), certiorari denied, 339 U.S. 986 (emphasis added). To urge otherwise would make the summary dismissal exception in Section 2255 wellnigh meaningless.

1. The district court specifically found that the motion, files and records refuted petitioner's assertions as to his plea. The record supports this finding and leaves no room for doubt that the plea was made deliberately and with understanding. At every one of his several appearances before Judge Kloeb (see the Statement, *supra,* pp. 9–11), petitioner was represented by counsel of his own choice. The offenses were read and explained to him, and the gravity of the crimes noted. Petitioner personally assured Judge Kloeb that he desired to waive indictment and to enter pleas of guilty. As to these matters, Judge Kloeb, in evaluating the motion under 28 USC 2255, could rely not only upon the transcripts but also upon his personal recollection. See *Sanchez* v. *United States,* 256 F. 2d 73 (C.A. 1); *Trumblay* v. *United States,* 278 F. 2d 229 (C.A. 7), certiorari denied, 352 U.S. 931. Moreover, Judge Kloeb had heard petitioner's testimony as to his guilt and had observed his demeanor at Marvin Breaton's trial (see the Statement, *supra,* p. 10). These circumstances taken as a whole justified the judge in finding that, at the time petitioner deliberately entered the plea, he was not induced by promises allegedly made by the Assist-

ant United States Attorney. See, *e.g., Bone* v. *United States,* 277 F. 2d 63 (C.A. 8).

The court's conclusion is reinforced by certain recitations in petitioner's motion which the court of its own personal knowledge concluded were untrue. Thus Judge Kloeb noted in his opinion that he had never received the two letters allegedly apprising the court of the prosecutor's promise, which petitioner asserted he had sent (M.R. 49). Judge Kloeb was influenced in large measure, as he had a right to be, by the letter which he in fact received from petitioner six months after sentencing (M.R. 50–52), which made no mention of the prosecutor's alleged promise to move for reduction of sentence from forty to twenty years within sixty days after sentence but instead asked the court to reduce the forty-year sentence to twenty-five years, and expressed remorse for admitted past transgressions (M.R. 53). (See the Statement, *supra,* pp. 11–12, 14). Under these circumstances, the court's credence would have been stretched to the breaking point if the court had been required to accept as substantial, even for the purpose of ordering a hearing, petitioner's protest, made for the first time three years after be began serving the forty-year sentence, that he had waived indictment and entered pleas of guilty only because the prosecutor had assured him he would get no more than twenty years. See *Williams* v. *United States,* 192 F. 2d 39 (C.A. 5); *United States* v. *Lowe,* 173 F. 2d 346, 347 (C.A. 2); *United States* v. *Harris,* 160 F. 2d 507, 510 (C.A. 2).

2. The purpose of a hearing pursuant to Section 2255 is to permit the prisoner to sustain charges that

have a chance of being upheld, and to enable the court to arrive at the truth. See *Crowe* v. *United States*, 175 F. 2d 799 (C.A. 4). A hearing in the face of the present record could not remotely redound to petitioner's benefit, despite his allegations as to his "deal" with the prosecutor. See *Johnson* v. *United States*, 239 F. 2d 698, 699 (C.A. 6). Significantly, petitioner's grounds and allegations are tailor-made to meet his lack of supporting data as well as his inconsistency of conduct. Thus the claim of a "deal"—a matter ordinarily subject to verification—is recited in such a manner that no outside corroboration is possible. His affidavit describing the interviews he had with the Assistant United States Attorney mentions no witnesses and states that his attorney was not to be told, and in his account of government counsel's threat as to what would happen if he did not "keep his mouth shut" he completely rules out his attorney and others as possible sources of corroboration. To hold such allegations to be sufficient or credible enough to require a hearing, when brought years after conviction, would mean that the number of hearings held on motions under Section 2255 would be limited only by the imagination and ingenuity of the prisoners involved. Although the affidavit of the Assistant United States Attorney Condon (see the Statement, *supra*, pp. 13–14) cannot be accepted as determining the facts adversely to petitioner, it does perform the function of showing that the government denies and challenges petitioner's claims. In such circumstances, where the defendant's belated assertions are incapable of corroboration by evidence outside his own testimony and in critical part are

contradicted by the known facts of record, there is applicable the comment of the Sixth Circuit when it met a similar contention that the *Hayman* case required a hearing (*Johnson* v. *United States, supra,* 239 F. 2d at 699):

> We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for rehearings based on obviously nebulous and false accusations. * * *

3. There is no merit in petitioner's argument (M. Pet. Br. 11–13), based upon *Shelton* v. *United States,* 356 U.S. 26, that his conviction must be set aside for failure to comply with Rule 11, F. R. Crim. P. (*supra,* p. 5), which provides that a court "shall not accept the plea [of guilty] without first determining that the plea is made voluntarily with understanding of the nature of the charge." The Rule does not require that a court follow any particular ritual or any special form of words in determining whether a plea be voluntarily made.[24]

The procedure followed by the court in ascertaining whether petitioner fully understood the charges and desired to enter the plea certainly constituted ade-

[24] See *Nunley* v. *United States,* (C.A. 10, No. 6771, decided August 11, 1961); *Kennedy* v. *United States,* 259 F. 2d 883 (C.A. 5); cf. *United States* v. *Davis,* 212 F. 2d 264, 267 (C.A. 7); *United States* v. *Swaggerty,* 218 F. 2d 875 (C.A. 7), certiorari denied, 349 U.S. 959; *United States* v. *Von Der Heide,* 169 F. Supp. 560 (D. D.C.).

quate compliance with Rule 11. See *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7). The charges were read to petitioner in open court and the court received counsel's assurance that they had been discussed with petitioner and petitioner's personal assurances that he himself desired to enter the pleas (see the Statement, *supra*, pp. 9–11).

The distinctions between this case and the *Shelton* case, *supra*, are obvious and numerous. One basic difference is that petitioner, unlike Shelton, was represented by counsel.[35] Moreover, in *Shelton* it was conceded that the prosecutor had promised to recommend leniency in return for a plea of guilty. Further, on the record, it was uncontroverted that Shelton had continually protested his innocence to the Assistant United States Attorney and that the Assistant United States Attorney had told Shelton, before he entered the courtroom, not to "go in there and shoot your mouth off or the Judge may not take your plea." See the government's Memorandum in *Shelton* v. *United States*, No. 223 Misc., Oct. Term, 1957, p. 6. There was also on the record no denial of Shelton's claim that he was ill and that his plea was induced by his long detention in county jails to which he did not wish to be returned, and by the government's refusal to hasten his retrial (after an earlier mistrial) by agreeing to dispense with a jury.

[35] Section 224 of the American Law Institute's Code of Criminal Procedure requires the court to explain to the defendant the consequences of a plea of guilty, before accepting such a plea, only when the defendant is not represented by counsel. Accord, *United States* v. *Shepherd*, 108 F. Supp. 721 (D. N.H.); see *Barber* v. *United States*, 227 F. 2d 431 (C.A. 10); *United States* v. *Sturm*, 180 F. 2d 413, 416 (C.A. 7), certiorari denied, 339 U.S. 986.

The present case is in sharp contrast. Petitioner had experienced counsel. At no time did he claim to be innocent—indeed he testified as to his guilt. The record is devoid of any suggestion that the prosecutor promised leniency or improperly applied pressure or that there might have been a motivating factor, other than a desire to plead guilty, which culminated in the plea which was accepted. In fact, the whole pattern of petitioner's conduct at the time—his act of surrender to the jurisdiction in waiving extradition, his assurances in open court as to his desires, his contrite letter to the court following sentencing—shows voluntariness and volition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court below should be affirmed.

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